71-1534

No.

FILE COPY

Supreme Court, U. S.
FILED
MAY 24 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MONTANA POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, and THE SECRETARY OF THE INTERIOR, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES A. HORSKY
888 - 16th Street, N.W.
Washington, D. C. 20006
Attorney for Petitioner

Of Counsel:

JOSEPH A. MCELWAIN
WILLIAM H. COLDIRON
The Montana Power Company
Butte, Montana 59701

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Other Materials Involved	3
Statement	3
Argument	10
Conclusion	21

TABLE OF CITATIONS

CASES:

Abbott Laboratories v. *Gardner*, 387 U.S. 136	21
Allen v. *Grand Central Aircraft Co.*, 347 U.S. 535	13
Bernhardt v. *Polygraphic Co.*, 350 U.S. 198	15
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327	4
California Oregon Power Co. v. *Federal Power Commission*, 239 F.2d 426 (D.C. Cir. 1956)	18
De La Rama S.S. Co. v. *United States*, 344 U.S. 386	12, 13, 14, 15
El Paso v. *Simmons*, 379 U.S. 497	15
Erie R.R. v. *Tompkins*, 304 U.S. 64	15
Greene v. *United States*, 376 U.S. 149	16, 17
Montana Power Co. v. *Federal Power Commission*, 298 F.2d 335 (D.C. Cir. 1962)	20
Montana Power Co. v. *Federal Power Commission*, 445 F.2d 739 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013	11
Montana Power Co., Project No. 5, 38 F.P.C. 766 (1967), *rehearing denied*, 39 F.P.C. 321 (1968)	1, 2, *et passim*

Page

New York Shipbuilding Corp. v. *United States*, 385 F.2d 427 (C.Cls. 1967) ..... 16 n.
Oklahoma Gin Co. v. *Oklahoma*, 252 U.S. 339 21
Oklahoma Operating Co. v. *Love*, 252 U.S. 331 21
Pennsylvania Power & Light Co. v. *Federal Power Commission*, 139 F.2d 445 (3rd Cir. 1943), *cert. denied*, 321 U.S. 798 ..... 14 n.
Tumey v. *Ohio*, 273 U.S. 510 16
Union Pacific R. Co. v. *Laramie Stock Yards*, 231 U.S. 190 ..... 16, 17
United States v. *Utah Construction Co.*, 384 U.S. 394.. 16
Ex parte Young, 209 U.S. 123 21

STATUTES:

Federal Power Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 838, as amended, 16 U.S.C. §§ 791 *et seq.*) ..... 3, 5, 14 n., A2, *et passim*
Federal Water Power Act of 1920 (Act of June 10, 1920, c. 285, 41 Stat. 1063) 3, 4, 5, 13, A1
War Risk Insurance Act (Act of June 29, 1940, c. 446, 54 Stat. 689) 12

LEGISLATION:

Sen. Rep. No. 621, Committee on Interstate Commerce, U.S. Senate, 74th Cong., 1st Sess. (1935) ..... 14 n.
H.R. Rep. No. 1318, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 74th Cong., 1st Sess. (1935) ..... 14 n.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

MONTANA POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, and THE SECRETARY OF THE INTERIOR, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Federal Power Commission and a Commissioner's concurring opinion are set out in the Appendix accompanying this petition at pages 110a, *et seq.*, and are reported at 38 F.P.C. 766. The Commission's order denying rehearing and a dissent to that order appear at pages 142a, *et seq.* of the Appen-

dix, and are reported at 39 F.P.C. 321. The first opinion of the court below on the arbitration issue and a dissent thereto, are set out in the Appendix at pages 82a, *et seq.*, and are not reported. The opinion of the court on that issue after rehearing *en banc*, and concurring and dissenting opinions to the *en banc* decision, are set out in Appendix at pages 35a, *et seq.*, and are reported at 445 F.2d 739. The further opinion of the court below on the merits, and the concurring and dissenting opinions to that decision, are set out in the Appendix at pages 1a, *et seq.*, and are not yet reported.

JURISDICTION

The opinion and order of the United States Court of Appeals for the District of Columbia Circuit were entered on February 17, 1972 (Appendix, pp. 33a-34a). A timely petition for rehearing was denied on April 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, when a federal regulatory statute provides that subsequent amendments shall not "affect any license theretofore issued under the provisions of this [Act] or the rights of any licensee thereunder" and a license is issued under that statute providing that a particular issue shall be resolved by arbitration of a neutral third party, the agency can itself adjudicate that issue in reliance upon an amendment to the statute passed after the issuance of the license.

2. Whether, under a license contract providing that rentals may be "readjusted" after 20 years, the rentals can be redetermined *de novo* without reference to the rental originally negotiated.

3. Whether, under a license contract providing that the annual rental originally negotiated shall continue to be payable until an adjustment "shall have been effected," the new rental may nonetheless be made retroactive.

4. Whether the annual rental under the Company's license contract was properly readjusted.

STATUTES AND OTHER MATERIALS INVOLVED

The relevant sections of the Federal Water Power Act of 1920 (Act of June 10, 1920, c. 285, 41 Stat. 1063), and of the Federal Power Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 838, as amended 16 U.S.C. §§ 791 *et seq.*), and relevant portions of the Company's license agreement, are set forth in an attachment to this petition.

STATEMENT

This case has had a long history. A decision by the court below recognizing the Company's contractual right to arbitration of the controversy was later reversed by the court below *en banc*, in a 4-3 decision. An interim petition for certiorari by the Company seeking review of that decision (No. 838, October Term 1970) was denied, Justice Harlan dissenting, on January 18, 1971 (400 U.S. 1013). Thereafter, the court below again declined to recognize, by a 2-1 vote, other contractual rights of the Company set out in its license contract, and this time declined *en banc* review.

The Company submits that the total effect of the decision of the court below is so far to depart from appropriate recognition of the Company's contract rights as to call for review by this Court. We present in this petition, therefore, both the arbitration issue raised by the prior petition—which the Court may have felt, as

one of the respondents then urged, was interim and premature (*cf. Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328)—as well as the issues raised by the refusal of the court below to recognize and give effect to additional contract rights of the Company.

* * * * *

This case began when the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the Tribes) filed a petition with the Federal Power Commission (the Commission) seeking readjustment of the annual rental charges owed to the Tribes by the Company for use of the Tribes' lands for a federal power project, partially located on the Tribes' lands.

a. The issue as to arbitration:

The Company promptly objected to the jurisdiction of the Commission, asserting that the readjustment issue must be referred to arbitration. Its license contract had been issued under section 10(e) of the Federal Water Power Act of 1920, which provided that annual rental charges "may be readjusted at the end of twenty years after the beginning of operations . . . in a manner to be described in each license. . . ." Pursuant thereto, the Company's license contract contains the following provision:

> "The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operations under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior cannot agree upon the readjustment of such charges, it is hereby agreed that the fixing of

> readjusted charges shall be submitted to arbitration in the manner provided for in 'The United States Arbitration Act,' (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit: upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."

The Tribes, however, asserted that the Commission could entertain their petition because section 10(e) had been amended by the Federal Power Act of 1935, several years after the signing of the Company's license contract. The amended section 10(e) provides that annual rental charges "may . . . be readjusted by the Commission at the end of twenty years after the project is available for service. . . ."

However, the 1920 Act, in a provision *not* amended in 1935, provides (section 28):

> "The right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder."

The Commission's decision of October 4, 1967 (Appendix, pp. 110a-142a), rejected the Company's position and proceeded under the asserted authority of the 1935 amendment to a "readjustment" of the annual charges due to the Tribes by the Company—increasing them from $238,375 per year to $950,000 per year, retroactive to May 20, 1959, with the back payments to bear interest at 6%.

On petition to review, the court below, in an opinion by Judge Tamm, joined by then Judge Berger, with

Judge Leventhal dissenting, held that the Commission lacked jurisdiction, and remanded the matter for arbitration in compliance with the contract. Upon rehearing *en banc,* however, the court, in a 4-3 decision, with Judges Tamm, McGowan and McKinnon in dissent, reversed. In the opinion of the majority, section 28, quoted above, protected the Company "in general" only from "substantive" changes in its contract, not from "procedural" changes, and the right specified in the contract to arbitration was a "procedural" right merely. The court went on to say that *some* "procedural" rights would be protected if it appeared that the right involved "had either been bargained for as a right or had otherwise been established as a matter of such importance that its removal raised problems of fairness" (Appendix, p. 47a)—a showing the court held the Company had not made (Appendix p. 54a).*

Judge Tamm, dissenting, noted that Section 28 on its face protects *all* rights of licensees—indeed uses disjunctive phrasing to emphasize that subsequent legislation shall not "affect any license" *or* "the rights of any licensee" (Appendix, p. 72a). He also found it impossible, considering the circumstances surrounding the issuance of the Company's license, to reconcile the majority's fashioning of a distinction between "procedural" and "substantive" rights with the decisions of this Court. Judge McKinnon concurred with Judge Tamm's decision, but added his belief that the legislative history of the 1935 amendment to Section 10(e), which he set out in detail in his opinion (Ap-

* A motion by the Company that the Court remand the proceeding to the Commission to enable the Company to produce evidence to meet this unique and newly-announced definition of protected rights—to prove that the arbitration clause had been "bargained for"—was denied, without opinion.

pendix, p. 78a-80a), revealed that Congress intended that it should not apply to existing licenses, such as that of the Company. Judge McGowan joined in both dissents.

b. The issues of the merits:

The right of the Company to arbitration having thus been disposed of, the Court, in its third opinion of February 17, 1972, dealt with other contract rights asserted by the Company which the Commission had refused to recognize, and rejected all of the Company's claims.*

(1) The Company, the Commission and the Secretary of the Interior as the representative of the Tribes had all agreed in 1930, after long and hard bargaining, that the reasonable annual charges for the use of the Tribes' land, based upon the commercial value for the most profitable purpose for which it was suitable, including power development, was $175,000, and the license contract so provides.** The contract also provided, as already noted, that the annual rental payments "may be readjusted at the end of twenty (20)

* We present, in this statement, only the claims made by the Company based upon its license contract. As the opinions below reveal, the Company also asserts that the Commission and the court below erred in several other respects—the propriety of including in its "readjustment" the annual payment for a later but related license; the method and calculations used to "value" the Tribes' property; and whether interest was payable on the retroactive payments and at what rate. The court below accepted, in part, the Company's position on this last issue, and reduced the rate of interest on the retroactive payments from 6 to 4 per cent (Appendix, p. 34a).

** When a third generating unit was added by the Company in 1954, an additional annual payment for that unit of $63,375 was added.

years after the beginning of operations." When the twenty years had elapsed, on May 20, 1959, and the Commission (arbitration having been denied) undertook to readjust the annual rentals, the Company asserted that the "readjustment" specified in the Company's contract meant just that—that the Commission find what changes had occurred to make the previously agreed reasonable charge unreasonable, and determine what adjustment of the previous annual rental those changes required to again reach a reasonable level.

The Commission, however, expressly refused to "readjust." It insisted, rather, that "the entire analysis [of a proper annual rental] must be made *de novo*" (Appendix, p. 124a). It accepted without modification the original standard—the commercial value for the most profitable purpose for which the Tribes' land was suitable, including power development—but expressly declined to begin with the annual charge on which the parties had originally agreed and to determine what adjustments to that annual charge were necessary. Indeed, it refused to give any weight whatever to the original annual charge which it was to "readjust."

The opinion below accepts this *de novo* approach as a "reasonable . . . interpretation by the Commission of the governing provision of the statute it administers" (Appendix, p. 6a). The opinion makes no reference to the language of the license contract quoted above, which the Commission is *not* free to interpret in the same fashion. Judge Tamm, in dissent, noted that "'Readjustment' is not a synonym for 'fix anew.'" "The term," he continued, "contemplates adjustment of an annual charge once reasonable, but now found unreasonable. It requires a finding that the

former charge is unreasonable, a statement of reasons for the finding and a modification guided by those reasons to accommodate the changed circumstances." (Appendix, p. 22a.) He added that the contrary opinion of the majority, considering the legislative history of the Act and the fact that the Company's license is for a 50-year period, "flies in the face of Congress' attempt to create investment security" for licensees.

(2) The license contract of the Company is also specific on the issue of a retroactive payment of the new annual charge. Article 30(A)(3) of the license (attachment pp. A5 ff.), after setting out a schedule of annual charges for various periods ending with the year 1954, then states that—

> "Thereafter, *until adjustment of the annual charges payable hereunder shall have been effected* pursuant to the provisions of paragraph (D) of this Article 30 ..... $175,000."

This contract provision has not been amended. (As noted above, as a result of the later addition of a third power unit, a subparagraph (4) was added to the contract providing that "in addition to the charges set forth above," the Company "shall pay . . . an annual charge of $63,375.")

The Company asserted, therefore, that the Commission could not, consistently with the contract, decree retroactive payment of its *de novo* determined rate back to May 20, 1959, since under no interpretation of the contract language was a readjustment "effected" on that date. The Commission, however, with the approval of the majority of the court below, concluded that the contract meant no more than "that until the readjustment proceedings are concluded the rentals

shall continue to be paid as previously fixed, but that when the proceedings are concluded the readjusted rentals may be made effective from the end of the 20 year period" (Appendix, pp. 9a-10a), a meaning which reduces the words to a nullity, since payments of a readjusted rental could not be made in any event until it was determined what it should be. Judge Leventhal, dissenting, stated that he did "not think a basis has been laid for making [the new annual rental] retroactive to expiration of the 20-year term" (Appendix, p. 27a). The Commission was in error, he pointed out, in asserting that the Company could have avoided injury by maintaining a reserve account, since the regulatory commissions to which the Company is subject would not have permitted it, at least until the contingency became much more certain, and the long delay in finally "effecting" a new annual charge could not be attributed to the Company (Appendix, pp. 29a-30a). Judge Leventhal, in a conclusion seemingly inconsistent with his acceptance of a *de novo* "readjustment," would limit any payment retroactive to May 20, 1959, to whatever amount would "reflect known changes," which he suggests would be a new annual charge of $270,000 (Appendix, pp. 28a, 30a).

As noted above, a petition for rehearing and for *en banc* review was denied.

ARGUMENT

This is no ordinary case. By a series of decisions over several years the court below has sanctioned an emasculation by the Commission of protections carefully written into a long-term—50-year—commitment by the Company—protections on which the Company was entitled to rely when it finally agreed to the license

contract some 40 years ago. Judge Tamm, dissenting, summarizes (Appendix, p. 24a):

> "This court has once before significantly altered the original contract between the parties in *Montana Power Co.* v. *FPC*, . . . While I am bound by that decision, I note with dismay that this court has again taken its cutting shears to the contract. This court would do well to recall that we are dealing here with a contract, not thistledown or a transient cloud spun on gossamer. Contracts should provide constancy, not ephemerality. The past should be prologue, not postscript. By ignoring historical antecedents the Commission seriously impinges upon the traditional respect the law has accorded contracts."

Judge Tamm does not exaggerate.

I

In its first, *en banc,* decision, to which Judge Tamm refers, a bare majority of the court below fashioned a limitation upon the protection afforded the Company by its contract and by the general savings clause of section 28—an assurance that no subsequent legislation "shall affect any license theretofore issued under the provisions of this Act." This, the court held, meant, not what it said, but rather that any license provision which the Commission and the court deemed "procedural" *could* be "affected"—that is, ignored. A significant right of the Company—the right to an impartial arbiter if the Company and the Commission could not agree on the "readjusted" annual charges—was nullified, and the issue was remitted instead to the determination of one of the parties to the contract—the Commission.

A. The decision not only deprived the Company of a significant protective feature—doubly significant be-

cause of the long term of its contractual obligation—but also ignored prior decisions by this Court. In *De La Rama S.S. Co.* v. *United States,* 344 U.S. 386, this Court unanimously rejected any interpretation of general savings clauses that turns upon an implied distinction between procedural and substantive rights. In that case the petitioner steamship company filed a libel in a district court pursuant to jurisdiction granted by the War Risk Insurance Act, 54 Stat. 689, 690. Subsequently, Congress cancelled a number of war power statutes, including the War Risk Insurance Act, while at the same time enacting a general savings clause with respect to this legislation. The Government conceded that under the savings clause its liability to the petitioner did not end with the repeal of the War Risk Insurance Act; its claim was that the repeal of that act removed the sole basis for district court jurisdiction of petitioner's suit and that, therefore, the action must be brought in the Court of Claims.

The Government's argument that the general savings clause preserved only the substantive right to recover on the insurance policy and not the procedural right to an enforcement action in a district court was dismissed by Mr. Justice Frankfurter for the Court as a "contention which . . . goes a long way toward disposing of itself," 344 U.S. at 388, since it was based upon a distinction between substance and procedure that "is no more substantial than the tenuous bits of legal reasoning of which it is compounded," *id.* at 389.

The Court's refutation of the Government's argument so clearly shows the error of the court below that it deserves quotation at some length:

> "The Government rightly points to the difference between the repeal of statutes solely jurisdic-

tional in their scope and the repeal of statutes which create rights and also prescribe how the rights are to be vindicated. In the latter statutes, 'substantive' and 'procedural' are not disparate categories; they are fused components of the expression of a policy.

* * * * *

"If the aim is to destroy a tribunal or to take cases away from it, there is no basis for finding savings exceptions unless they are made explicit. But where the object of Congress was to destroy rights in the future while saving those which have accrued, to strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and hence to defeat rather than further the legislative purpose." 344 U.S. at 390.

Cf. Allen v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 554-55.

De La Rama S.S. is directly applicable here. The provisions of the Company's license made pursuant to section 10(e) of the 1920 Act, like the statute in *De La Rama S.S.*, defined both the standard by which the Company's future liability to the Tribes was to be measured and the method by which that standard was to be applied. The Company's license provided that readjustment of the land rentals would be in accordance with "the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." The majority below conceded that section 28 of the Act proscribes the use of some different standard in adjudging future liability to the Tribes (Appendix, pp. 46a-47a). Plainly then, the rationale of *De La Rama S.S.* requires that the bargaining and arbitration framework set up to

implement this standard be preserved with it.* In short, the prescription of the standard of liability and the means for applying that standard represent "fused components" which under *De La Rama S.S.* are both preserved by a general savings clause, such as section 28 of the Power Act.**

* The Court's concern in De La Rama S.S. to preserve the procedures developed with reference to the implementation of a substantive right is strikingly illustrated by the decision of the Commission in this case concerning the actual readjustment to be awarded to the Tribes. The Commission apparently based its conclusion in part upon the standard of "reasonableness" set forth in the 1935 Act as the measure of the Company's liability to the Tribes rather than on the standard set out in the license. (Appendix, p. 124a.) It is not surpising that a Commission charged with the daily task of fixing "reasonable" rates and the like would be influenced by such a standard even though not set forth in the Company's license; an arbitrator, whose charter is the agreement of the parties, would be much less likely to depart from the standard set forth in the agreement.

** The majority below relied upon dicta in Pennsylvania Power & Light Co. v. FPC, 139 F.2d 445 (3rd Cir. 1943), *cert. denied*, 321 U.S. 798, in fashioning its distinction between "procedural" and "substantive" rights in the application of Section 28 of the Act. Even the dicta of that case are readily distinguishable under De La Rama S.S. The legislative history of the 1935 amendments clearly shows that section 14 of the Act, the statute involved in Pennsylvania Power & Light, was amended to substitute the Commission's determination of the "net investment" in a power project for that of a district court since Congress thought it "highly doubtful" whether the grant of jurisdiction to district courts under section 14 of the 1920 Act constituted a grant of "judicial power" within the meaning of Article III of the Constitution. Sen. Rep. No. 621, Committee on Interstate Commerce, U.S. Senate 74th Cong., 1st Sess. p. 46 (1935); H.R. Rep. No. 1318, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 74th Cong., 1st Sess. p. 25 (1935). Thus, the 1935 amendments to section 14 of the 1920 Act embodied a clear Congressional "aim . . . to destroy a tribunal or to take cases away from it." 344 U.S. at 390. The majority below conceded in this case, however, that "Congress did not expressly address itself to the issue of the applicability of the amended § 10(e) . . . to the problem of a pre-existing license containing a procedure for readjustment solely by agreement or arbitration." (Appendix, pp. 45a-46a.)

Plainly, saving the Company's rights here to bargain with the Commission and then to arbitrate, failing a bargain, has "dollars-and-cents importance," 344 U.S. at 389, just as did saving the steamship company's access to a district court in *De La Rama S.S.* In that case the sole difference between a suit to recover on an insurance policy in the Court of Claims and in the District Court was that interest on the recovery accrued from the time of filing suit in the District Court, whereas interest did not accrue in the Court of Claims until entry of that court's judgment. In this case, on the other hand, in dealing with a change from arbitration to administrative adjudication, we deal with a "change [that] . . . may make a radical difference in ultimate result." *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 203. In *Bernhardt* the Court rejected the contention that arbitration was merely procedural—"a form of trial"—for purposes of applying the rule of *Erie R.R.* v. *Tomkins,* 304 U.S. 64. *Cf. El Paso* v. *Simmons,* 379 U.S. 497, 506-509.

Moreover, *De La Rama S.S.* and *Bernhardt* involved merely the substitution of one neutral tribunal for another. In this case the substitution of the Commission for an arbitrator had a far greater impact. For under the agreement between the Company, the Commission and the Secretary embodied in the Company's license, all three parties were given a right to bargain concerning adjustments in the rental to be paid to the Tribes. The existence of a binding arbitration clause, which provided for the appointment of a neutral to impose a decision upon the parties, would inevitably tend to push them from their maximum demands in bargaining toward a negotiated agreement, since none of the parties could confidently expect that a neutral arbitrator would confirm its position in a subsequent arbitration proceeding.

But by substituting itself for the neutral arbitrator, the Commission utterly destroyed the bargaining arrangement provided for in the license and changed the status of the Company from a negotiator with the Commission to a mere supplicant before it. Thus, the alteration of the Company's rights effected by the decision below was not simply the substitution of one neutral tribunal for another; instead it substituted one of the parties to the agreement for the neutral arbitrator chosen by them as the judge of their disputes. *Cf. Tumey* v. *Ohio*, 273 U.S. 510; *United States* v. *Utah Construction Co.*, 384 U.S. 394, 404.*

B. Moreover, the decision below ignored the teaching of *Greene* v. *United States*, 376 U.S. 149, 160, and *Union Pacific R. Co.* v. *Laramie Stock Yards*, 231 U.S. 190, 199, that absent unequivocal expression to the contrary courts will give only prospective application to statutes. The majority of the court below conceded (Appendix, pp. 45a-46a):

> "So far as can now be gleaned, from the briefs of counsel and our own researches, Congress did not expressly address itself to the issue of the

* Compare also New York Shipbuilding Corp. v. United States, 385 F.2d 427 (1967), where the Court of Claims held that the United States could not unilaterally shift dispute resolution from an official named in the disputes clause of a Government contract to another official in the same agency, even though the administrative position identified in the contract had been abolished at the time the dispute arose. The Court of Claims reasoned that the contractor had bargained for dispute resolution by a particular official with limited responsibilities and detailed knowledge concerning the matters contemplated by the contract and that it could not therefore be made to accept dispute resolution by a government official with broader responsibilities and less knowledge about that area. Plainly, the substitution of the Commission, a party to the agreement, for a neutral arbitrator had a much more substantial effect than the attempted substitution of one Government official for another.

> applicability of the amended § 10(e), providing for Commission readjustment, to the problem of a preexisting license containing a procedure for readjustment solely by agreement or arbitration."

Notwithstanding that concession, and notwithstanding the general savings clause for existing licenses in section 28, quoted above, the court below *did* accord the 1935 amendment a retroactive application. And it reached that result notwithstanding the opinion of the three dissenting judges that there was strong affirmative evidence that Congress intended the 1935 amendment to be only prospective. In Judge McKinnon's words, "it seems abundantly clear that Congress in the 1935 amendment only intended to affect licenses issued thereafter" (Appendix, p. 79a). But one need not go that far; one need only accept the view of the majority to recognize that its decision cannot be squared with the statement of this Court in the *Union Pacific* case, as quoted in *Greene* v. *United States* (376 U.S. at p. 160):

> "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"

II

In the most recent opinion of the court below, to which Judge Tamm's comment quoted above was addressed, the court removed another contractual safeguard upon which the Company was entitled to rely—that when 20 years of operations had been concluded, and a readjustment of the annual rentals was per-

mitted, there would be, in fact, a *readjustment,* not a scrapping of everything that had been negotiated and a *de novo* determination made as if on a clean slate.

As pointed out above, the majority opinion of the court treated the issue not as a matter of what was provided in the Company's contract, but rather as to what was provided by section 10(e) itself—and therefore was able to rely on the general principle of accepting the interpretation placed on a statute by the agency which administers it (Appendix, p. 6a). But the issue was not the interpretation of the *statute,* but rather the meaning of the *contract,* as to which the Commission was *not* empowered to arrive at its own conclusion. The contract specified a "readjustment," not a "redetermination"—the word which the court used to describe the Commission's action.

Indeed, the court below declined, in this case, even to follow its own precedent. In *California Oregon Power Co.* v. *Federal Power Commission,* 239 F.2d 426 (1956), in which a readjustment under section 10(e) of charges for the use of a government dam was in issue, the court stated (at p. 431):

> "[The Commission's] power to readjust charges [under section 10(e)] for use of a Government dam is not unfettered. . . . Thus the only 'obligation' imposed upon Copco by Article 35(d) is to pay for use of a Government dam after twenty years *if* the present charges becomes unreasonable, and then (it would seem) only *if* the Commission prepares an adequate record showing what surplus water is, how much is being used, and what charge is to be imposed."

Here, on the contrary, the court was required to infer that the Commission had found the original annual charge unreasonable—it had made no finding to that

effect. More importantly, the court allowed the Commission to make *no* findings as to why or in what respect the original charge had become unreasonable—findings that would have permitted an "adjustment" of the original annual charge to compensate for the changes which made the original charge unreasonable.

A second protection which had been embodied in the Company's contract was thus permitted to be stripped away.

III

In its most recent opinion the majority of the court below also declined to enforce a further right asserted by the Company under its contract—that the readjusted rate would not be made retroactive. Article 30(A)(3), which is quoted in the Statement, *supra*, p. 9, provides a schedule of annual charges for various periods ending with the year 1954, and then states expressly that thereafter the payment shall be at an annual rate of $175,000 "until adjustment of the annual charges payable hereunder shall have been effected pursuant to" the license. This provision, for a company whose rates are subject to regulation, is an obvious safeguard: it must know the costs that it must present to the regulatory commissions that determine its rates. That it cannot do if a retroactive payment—in this case one which increases the original annual rental by some 400%, and for the period back to 1959—may be imposed.

The court, however, deprives the contract language of any effect by accepting the argument of the Commission that it means only that until a new rate is effected the company will pay at the old rate. Since that result would be inevitable in any event—the

Company could not pay at the new rate until there was one—the words of the contract are reduced to a nullity.

Moreover, as with the provision for "readjustment," the majority opinion deals with the issue as a question under section 10(e) and accepts the Commission's interpretation as one it is entitled to make under its own statute. The court did not face the issue as to the meaning of the *contract*, as to which the Commission's interpretation is entitled to no greater weight than that of the Company.

Finally, the huge retroactive payment, as Judge Leventhal, dissenting, points out, is peculiarly inequitable. The Tribes were not, of course, required to wait until 1959 to begin proceedings looking to a "readjustment" of the annual charges. On the other hand, the Company was wholly unable to protect itself. No regulatory commission would have permitted the Company to create in 1959 a reserve against a 400% increase in rentals, and the Company did not in fact create any reserve until after the Commission's decision in 1967. Nor was the inordinate delay by the Commission in reaching its decision attributable to the Company, as Judge Leventhal's dissent explains in detail (Appendix, pp. 29a-30a). The Commission did not charge the Company with the delay due to the litigation concerning the Commission's decision to add an additional rental for the so-called "third unit," ultimately decided by the court below in January 1962 (*Montana Power Co.* v. *Federal Power Commission*, 298 F.2d 335). And following that decision there was a delay by the Commission of more than three years, to 1965, before the hearing began. As Judge Leventhal pointed out (Appendix, p. 30a):

> "Perhaps this [three-year delay by the Commission] was due to its own needs, for allocating

staff to energy projects it considered of higher priority. But this was a tribunal not selected by the Company but imposed upon it. In the absence of a showing that the Company is somehow implicated in the Commission's delay in noticing the docket for hearing, I do not think the Company should be under an obligation to pay an increase in rental for that period except as to known changes." *

Perhaps it can be said that the Company could have avoided the problem of retroactivity by agreeing forthwith—in 1959—to whatever additional annual rental the Tribes and the Commission demanded. But certainly it was entitled to pursue its rights before the Commission, rather than accept that alternative. Under the circumstances, the retroactive payment ordered by the Commission and approved by the majority below smacks of the penalties for asserting rights to a hearing which have been condemned by this Court. *Oklahoma Operating Co.* v. *Love,* 252 U.S. 331; *Oklahoma Gin Co.* v. *Oklahoma,* 252 U.S. 339; *Ex parte Young,* 209 U.S. 123. *Cf. Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 152-153.

A third protection which had been embodied in the Company's contract has thus been nullified.

CONCLUSION

As stated at the outset, this is not an ordinary case. As it has proceeded through the court below, significant rights of the Company under its contract with the Commission have been nullified. In each instance, the court below has been sharply divided.

---

* Judge Leventhal noted elsewhere in his opinion that this would be at an annual rate of $270,000 (Appendix, p. 28a).

Indeed, in the most recent decision of the court below the result was even more unfortunate. Two of the three judges who participated believe that the order of the Commission was wrong—and very substantially wrong—although for different reasons. While such a result may on occasion be inevitable, the Company should not be required to forgo substantial contract rights under such circumstances if a remedy—review by this Court—is available.

Wherefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. HORSKY
888 - 16th Street, N.W.
Washington, D. C. 20006
Attorney for Petitioner

Of Counsel:

JOSEPH A. MCELWAIN
WILLIAM H. COLDIRON
The Montana Power Company
Butte, Montana 59701

May 1972

ATTACHMENT

Federal Water Power Act of 1920, Act of June 10, 1920, ch. 285, 41 Stat. 1063:

SEC. 10. That all licenses issued under this Act shall be on the following conditions:

* * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each liconse: *Provided,* That licenses for the development, transmission, or distribution of power by State or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in

projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

* * *

SEC. 28. That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

* * *

Federal Power Act of 1935, Act of August 26, 1935, ch. 687, 49 Stat. 838, as amended, 16 U.S.C. § 791 et seq.:

SEC. 10 [16 U.S.C. § 803]. All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:

* * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 792, 793, 795-818, and 820-823 of this title; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Com-

mission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

* * *

SEC. 28 [16 U.S.C. § 822]. The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the right of any license thereunder.

* * *

SEC. 313(b) [16 U.S.C. § 825(1)(b)]. Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of

the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

Kerr Project No. 5 Licenses*

Article 39. (a) The Licensee shall pay into the United States Treasury, as compensation for the use in connection with this license, of the Flathead Indian tribal lands, annual charges, computed as follows: During the period from May 23, 1930 to January 1, 1955, and in accordance with the following modified schedule of annual charges, the Licensee shall pay as charges the sum due under the license as originally executed, to-wit, $2,929,000, together with interest at the rate of 4 per cent per annum on all payments deferred under this modified schedule, such interest amounting to an additional $168,800, which sum shall be paid in annual installments as it accrues consistently with the following schedule of interest payments:

Schedule of Interest Payments

Year	Interest	Year	Interest
1934	$ 1,120	1945	$ 11,600
1935	3,040	1946	10,000
1936	4,960	1947	8,400
1937	7,480	1948	6,800
1938	11,000	1949	5,200
1939	14,400	1950	4,200
1940	16,000	1951	3,200
1941	16,000	1952	2,200
1942	14,800	1953	1,200
1943	13,600	1954	1,200
1944	12,400		
	Total		$168,800

It is agreed that should the said Licensee pay the whole or any part of the deferred charges in advance of the due date

* R. 8854 *et seq.*

provided for under the amended schedule herein, interest shall be paid only insofar as it actually has accrued. [Subarticle (a) was added by license amendment dated July 17, 1936.]

Schedule of Annual Charges

(1) A charge at the rate of $1,000 per calendar month beginning with the month in which the license was issued and extending to and including the month of May, 1939.

(2) A charge at the rate of $5,000 per month beginning with the calendar month of June, 1939, and extending to the end of the calendar year 1939.

(3) For each full calendar year from and after the first of January, 1940, annual charges will be as follows:

	Per Year
For the year 1940	$110,000
For the year 1941	150,000
For the years 1942 to 1945, inclusive	180,000
For the years 1946 to 1953, inclusive	200,000
For the year 1954	205,000
Thereafter, until adjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this Article 30	175,000

[The language of (1), (2) and (3) above was included in the license amendment of July 17, 1936. The original license read as follows:

Article 30. (a) The Licensee shall pay into the United States Treasury as compensation for the use, in connection with this license, of the Flathead Indian tribal lands annual charges computed as follows:

(1) A charge at the rate of One Thousand Dollars ($1,000) per calendar month beginning with the month in which the license is issued and extending to and including the month in which the project is placed in commercial operation. For the purpose of the payments under this article, the beginning of commercial operation shall be considered as the time when one of

the Licensee's generating units shall have been installed, tested, and demonstrated to be in suitable condition to produce electric energy for commercial purposes with a reasonable degree of reliability.

(2) A charge at the rate of Five Thousand Dollars ($5,000) per month beginning with the calendar month next succeeding the date on which the project is placed in commercial operation and extending to the end of the calendar year in which such commercial operation shall commence.

(3) For each full calendar year from and after the 1st of January next following the date on which the first unit is placed in commercial operation, annual charges will be as follows:

	Per Year
For the first two years	$ 60,000
For the third year	75,000
For the fourth year	100,000
For the fifth year	125,000
For the next five years	150,000
For the next five years	160,000
For the next five years and/or until readjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this Article 30	175,000]

Subject to the provisions of the Federal Power Act, the Licensee shall also pay to the United States for the purpose of compensating the Confederated Salish and Kootenai Indian tribes for the use of Flathead Indian tribal lands for transmission line purposes only, $198.97 for the period from March 25, 1937, through December 31, 1942; $35.16 for each calendar year from January 1, 1943, through December 31, 1945; and $50.86 for each calendar year thereafter.

[The above paragraph was added by license amendment dated November 28, 1945, and was amended to its present form by license amendment dated September 11, 1947.]

(4) In addition to the charges set forth above, the Licensee shall pay into the United States Treasury, as compensation for the use in connection with this license of the Flathead Indian lands by the third Kerr generating unit, an annual charge of $63,375, effective as of December 1, 1954. The additional annual charges from December 1, 1954 through December 31, 1958, shall be paid within 31 days after this order becomes final, together with simple interest thereon at the rate of 4 percent per annum, beginning as follows:

Period of Annual Charge	Amount of Annual Charge	Beginning of Interest Period
Dec. 1954	$ 5,281.25	Feb. 1, 1955
Year 1955	63,375.00	Feb. 1, 1956
Year 1956	63,375.00	Feb. 1, 1957
Year 1957	63,375.00	Feb. 1, 1958
Year 1958	63,375.00	Feb. 1, 1959

[Subsection (4) was added by license amendment dated January 30, 1961.]

(b) Payments shall be made for each calendar year within 30 days after the close thereof on bills rendered by the Commission.

(c) Pursuant to the provisions of the act of March 4, 1929 (45 Stat. 1640), all charges for reimbursing the United States for the cost of administration of the Federal Water Power Act have been and are hereby expressly waived.

(d) The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior cannot agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided

for in "The United States Arbitration Act," (U.S.C. Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to-wit: upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

* * *

Article 33. Whenever the Licensee is directly benefitted by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by the Licensee shall be determined from time to time by the Commission. Whenever such reservoir or other improvement is constructed by the United States, the Licensee shall pay similar charges into the Treasury of the United States upon bills rendered by the Commission.

Article 34. After the first twenty years of operation of said project under this license, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of the Licensee in said project, all as defined in and determined by the provisions of regulation 17 of said rules and regulations of the Commission, the Licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return shall, subject to the proviso of paragraph A, section 3 of said regulation, be one and one-half (1½) times the weighted average annual interest rate payable on the par value of the bona fide interest-bearing debt of the Licensee actually outstanding, in whole or in part, on account of project property at the beginning of the period of amor-

tization and of each calendar year thereafter; such weighted average annual interest rate being determined as provided in paragraphs B and C of Section 3 of said regulation 17: Provided, That, if at the beginning of the period of amortization or of any calendar year thereafter, the outstanding interest-bearing debt of the Licensee on account of the project or projects under license, together with any other works or property operated in connection therewith, is less than 25 per cent of the actual, legitimate investment of the Licensee in said project or projects, then and in such event for the calendar year next following the specified rate of return shall be two (2) times the legal rate of interest in the State in which the project or major part thereof is located.

Subject to the provisons of Section 6 of said regulation, the following proportions of such surplus earnings shall be paid into and held in such amortization reserves: Of all surplus earnings up to and including 2 per cent upon the actual, legitimate investment, 30 per cent thereof shall be so paid; of all surplus earnings in excess of 2 per cent and not in excess of 4 per cent upon such investment, 50 per cent thereof shall be so paid; of all surplus earnings in excess of 4 per cent and not in excess of 6 per cent, 70 per cent thereof shall be so paid, and of all surplus earnings in excess of 6 per cent, 90 per cent thereof shall be so paid: Provided, That if at the end of any calendar year of the amortization period the Commission shall find that the accumulated earnings of the Licensee during the period of operation, including the first twenty (20) years thereof, have not yielded a fair return upon the actual, legitimate investment in the project or projects under license, the proportion of such surplus earnings for such calendar year and for succeeding calendar years to be paid into such amortization reserves shall be ten (10) per cent thereof until such time as the accumulated earnings of the Licensee represent, in the judgment of the Commission, a fair return upon such investment for such period of operation.

* * *

Article 41. With the written consent of the Licensee, the Commission may by order made under its seal, and after the public notice required by Section 6 of the Act, modify, alter, enlarge or omit, insofar as authorized by law, any one or more of the conditions or provisions of this license; provided, however, that any such change in the terms of this license that may affect the interests of the Flathead Indians shall also be subject to approval by the Secretary of the Interior.

71-1534

ILE COPY No.

Supreme Court, U. S.
FILED
MAY 24 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

MONTANA POWER COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, and THE SECRETARY OF THE INTERIOR, *Respondents*.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the District of Columbia Circuit dated February 17, 1972	1a
Order of the United States Court of Appeals for the District of Columbia Circuit entered February 17, 1972	33a
En Banc Opinion of the United States Court of Appeals for the District of Columbia Circuit dated July 15, 1970	35a
Order of the United States Court of Appeals for the District of Columbia Circuit	81a
Opinion of the Panel of the United States Court of Appeals for the District of Columbia dated June 26, 1969	82a
Opinion and Order of the Federal Power Commission dated October 4, 1967	110a
Order Denying Rehearing of the Federal Power Commission dated March 21, 1968	142a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,904

THE MONTANA POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

CONFEDERATED SALISH AND KOOTENAI TRIBES, ETC., SECRETARY OF INTERIOR, *Intervenors*

No. 21,767

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*
MONTANA POWER COMPANY, *Intervenor*

Petitions for Review of Order of the Federal Power Commission

---

Decided February 17, 1972

Mr. Charles A. Horsky, with whom *Messrs. G. Joseph Vining, Willard W. Gatchell* and *Joseph A. McElwain* were on the brief, for petitioner in No. 21,904 and intervenor in No. 21,767. *Mr. John C. Hauck* also entered an appearance for petitioner in No. 21,904.

Mr. Richard A. Bacuen, with whom *Messrs. Charles A. Hobbs* and *Jerry C. Strauss* were on the brief, for petitioners in No. 21,767 and intervenors in No. 21,904.

Mr. David F. Stover, Attorney, Federal Power Commission, with whom *Messrs. Richard A. Solomon*, General Counsel at the time the brief was filed, *Peter H. Schiff*, Solicitor at the time the brief was filed, *Drexel D. Journey*, Assistant General Counsel, and *William H. Arkin*, Attorney, Federal Power Commission, were on the brief, for respondent.

Mr. A. Donald Milcur, Attorney, Department of Justice, with whom *Mr. Clyde O. Martz*, Assistant Attorney General at the time the brief was filed, *Messrs. Roger P. Marquis*, Attorney, Department of Justice, and *George Miron*, Associate Solicitor, Reclamation and Power, Department of the Interior, were on the brief, for intervenor in No. 21,904.

Before FAHY, Senior Circuit Judge, and TAMM and LEVENTHAL, *Circuit Judges*.

Opinion for the Court filed by FAHY, *Senior Circuit Judge*.

Opinion filed by TAMM, *Circuit Judge*, concurring in part and dissenting in part, at p. 22.

Opinion filed by LEVENTHAL, *Circuit Judge*, concurring in part and dissenting in part, at p. 27.

FAHY, *Senior Circuit Judge*: The cases challenge the correctness of the amount of annual rental charges the Montana Power Company has been ordered by the Federal Power Commission to pay to the Confederated Salish and Kootenai Tribes of Indians of the Flathead Reservation for use by the Company [1] of lands of the Tribes. The lands are used in the Company's Kerr Hydro-Electric Development on the Flathead River in Montana,[2] operated under a license issued in 1930 by authority of the Federal Water

---

[1] Our reference to the Company includes the present Company's predecessor.

[2] The Kerr project is also known as Project No. 5.

Power Act of 1920,[3] and the Act of March 7, 1928.[4] The original license was for fifty years. The dam itself is 381 feet long and 200 feet high. It was built by the Company but is entirely on Tribal land. The Tribes also own one half of the land of the reservoir, known as the Flathead Lake. In addition to the dam and reservoir, the Kerr project consists of three power generating units, built by the Company. Upstream from Kerr is a development known as Hungry Horse, owned by the federal government, and with a large storage capacity. The release of waters from Hungry Horse accordingly affects the flow downstream to Kerr, and this as we shall see affects the calculations used in arriving at the rentals due the Tribes.

When the license was issued in 1930 the applicable statutes referred to above provided that the annual rentals due the Tribes should be fixed by the Power Commission, and that after 20 years of service the charges "may be readjusted . . . in a manner to be described in each license." The license so provided in a manner leading to arbitration unless the rentals were reached by mutual agreement under procedures set forth in the license. When the Commission was reorganized as an independent agency in 1935, however, an amendment to the statute vested in the Commission the authority to readjust the charges, subject to judicial review. The Company, in an earlier stage of the present litigation, challenged the validity of this amendment, claiming it invalidly departed from the license terms. In *Montana Power Co.* v. *Federal Power Comm'n*, — U.S. App. D.C. —, 445 F.2d 739 (1970), *cert. denied*, 400 U.S. 1013 (1971), this court en banc, supplanting an opinion of one of its divisions, rejected the Company's challenge to the jurisdiction of the Commission to readjust the

---

[3] Ch. 285, 41 Stat. 1063. This act was restated and modernized by the Federal Power Act of 1935, ch. 687, 49 Stat. 838, 16 U.S.C. §§ 791-823 (1964).

[4] Ch. 137, 45 Stat. 200, 212-13.

rentals. The en banc court left the merits of the readjustment which had been made by the Commission to be considered by the available two members of the original division and another judge to be drawn by lot, under the court's longstanding procedure, to take the place of Honorable Warren E. Burger, who was becoming Chief Justice, and who had been the third member of the original division. The case is now before the division thus composed.

The principal questions arise on the petition for review filed by the Company in No. 21904, which we consider first. We then consider the petition of the Tribes in No. 21767.[3]

I

The following provisions of Section 10(e) of the Federal Water Power Act, as worded when the original license was issued, are basic to the Commission's responsibility:

> [W]hen licenses are issued involving the use of . . . tribal lands embraced within Indian reservations the commission shall . . . fix a reasonable annual charge for the use thereof, and such charges may . . . be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license.

Federal Water Power Act of 1920, ch. 285, § 10(e), 41 Stat. 1069.

The first unit of the Kerr project became operative in 1939, and the second unit in 1949, at which time the annual rental charges totaled $175,000. This amount was increased by $63,375 when the third and last unit became operational in 1954, making then a total of $238,375. In 1959, twenty years from May 20, 1939, when the project

[3] The Secretary of the Interior, in light of his special responsibilities with respect to the affairs of the Indians, was permitted to intervene before the Commission, and retains intervenor status in these court proceedings.

first became operational, the Tribes petitioned[6] for readjustment under Section 10(e). The ensuing proceedings were first before an Examiner, who would have readjusted the annual charges at $850,000. There followed exceptions to his Findings and Conclusions, in turn followed by the disputed Commission's Finding and Order now being reviewed.[7] The Commission held (1) the Kerr project was available for and began commercial operations May 20, 1939; (2) the readjusted annual charges should be effective 20 years from May 20, 1939; (3) the readjustment should include the third unit; and (4) the readjusted annual charges are $950,000, with simple interest at 6 percent. We affirm the Commission, with a modification of the interest item.

We now review the several problems presented by the Company's petition in No. 21904 and give our reasons for sustaining the Commission except as to the interest.

II

The Company contends that Section 10(e) does not permit a *de novo* determination of the rentals, but requires the Commission as a first step in the new inquiry to assume the reasonableness of the original charges, to be modified only as changed circumstances might warrant. The contention is summarized by the Commission as follows:

> Montana Power argues that the Commission should be limited to its determination of reasonable annual charges to modifying the annual charges previously determined to reflect any changed circumstances.

The Commission rejected this position, stating:

> Nothing in Section 10(e) of the Federal Power Act or in the Kerr license suggests such a limitation. These

---

[6] The petition was actually filed May 19, 1959.

[7] Applications for rehearing before the Commission had been denied.

> sources provide two broad standards: one, that the charges be based on the commercial value of the lands for the most profitable purpose; and second, that they be reasonable. In our opinion the reasonable commercial value of the land cannot be determined by considering individual factors in isolation. Instead, in fairness to all parties the entire analysis must be made *de novo*. This, it should be noted, is the established practice in rate cases followed by this, and most other regulatory agencies.

Under applicable principles of law we accept, because reasonable, this interpretation by the Commission of the governing provision of the statute it administers.[8] *Udall* v. *Tallman*, 380 U.S. 1 (1964); *California Co.* v. *Udall*, 111 U.S. App. D.C. 262, 266, 296 F.2d 384, 388 (1961). In fulfilling its responsibility of fixing the rentals at intervals separated by a number of years it is more reasonable to interpret Section 10(e) to permit the Commission to redetermine the rentals than to be bound to an earlier standard not currently acceptable in comparison with others. Moreover, it is implicit in the Commission's decision that the original charges had become unreasonable within the meaning of *California Oregon Power Co.* v. *Federal Power Comm'n*, 99 U.S. App. D.C. 263, 239 F.2d 426 (1956), cited by the Company for the position that the readjustment of charges only follows when the current charges have become unreasonable.

III

The Company contends that it was error for the Commission to include charges for the third unit in these proceedings which were initiated in 1959, because that unit

---

[8] The Commission supports its position also by referring to the following meaning of "to readjust" in Webster's New International Dictionary (2d Ed. 1939): "to adjust or settle again or anew."

was not placed in operation until 1954, so that 20 years of its serviceability would not arrive until 1974. The Company points out that the original authorization was for three generating units, reduced in 1936 to two, followed in 1951 with authority for the third unit, which, as we have said, became operational in 1954. The Company further points out that this court in *Montana Power Co.* v. *Federal Power Comm'n*, 112 U.S. App. D.C. 7, 298 F.2d 335 (1962), involving the dispute over charges for the third unit, described the grant of its authority as a new license, rather than as an amendment of the original license, as it was characterized by the Commission. It is said to follow that a new reasonable annual rental embracing the third unit may be imposed only after 20 years from 1954. Due to our earlier decision that the authorization of the third unit was by a new license the Company relies upon the doctrine of res adjudicata.

We think the solution of the problem does not turn on whether the authority for the third unit was a new license or an amendment of the 1930 license. The third unit had become part of the Kerr project when in 1959 the project itself had been operational for 20 years. The Company itself took the position in the Third Unit case that the rentals for the whole project, which had already been fixed, included rentals for this additional facility notwithstanding it had not been considered in the rental determination. This court disagreed, as follows:

> As we have said, the original license authorized three project works, but the amendment thereof [of 1936] to which we have referred authorized only two generating units. When the petitioner [the Company] sought authority for a third unit, the Commission granted it by way of further amendment to the original license to show the newly authorized third unit was a project works for an existing project; but it was by no means a part of the project works theretofore licensed. Thus, the additional authority, although

> called an amendment, was a new and original license for the third unit, within the meaning of Section 4(e) of the Act, and was subject to the requirements of Section 10(e) with respect to the use of the tribal lands.

112 U.S. App. D.C. at 11, 298 F.2d at 339. While the court refers to the authority for the third unit as an original license, it does so in a context which brings the unit into life as part of the Kerr project.

When 1959 arrived the whole project had taken form. Section 10(e) provides for readjustment of the charges at the end of twenty years after the beginning of operations[9] and at periods of not less than ten years thereafter. Under the Company's position there would be three twenty year intervals for the same project, 1959 for the first unit, 1969 for the second and 1974 for the third, with readjustments permissible for each unit in not less than separate ten-year intervals. It seems entirely reasonable for the Commission to have interpreted the Act to authorize it to readjust the rentals as the project stood at the end of 20 years from the beginning of its operations. The language of Section 10(e) is that readjustment may be made "at the end of twenty years after the project is available for service . . . ." The project was available for service, as it then existed, in 1939.[10] The other two units, like the first, are "Project works," to be distinguished from the "project." Section 3(11) of the Act defines "Project works" as "the

---

[9] The language "the beginning of operations" appears in Section 10(e) as originally enacted. In 1935 when it was amended, "the project is available for service" was substituted. There is no contention that this 1935 language means anything different from the 1920 language. The two phrases, therefore, are used interchangeably in this opinion.

[10] Section 3(11) defines "project" to mean a "complete unit of improvement . . . ." This cannot in reason be interpreted to mean only when all units are in operation, for surely rentals were not meant to wait until all of three possible units became operational.

physical structure of a project." With these distinctions as a guide to interpretation it was not unreasonable to rule that at the end of twenty years the three units constituted the "project" whose rentals could then be readjusted for the future.

IV

Should the rentals as readjusted in proceedings initiated in 1959 be made effective as of that year, although the proceedings were not concluded until some years later because of their protracted character? The Commission determined they should be, as had the Examiner. The Company, for a contrary position, relies primarily upon the words "shall have been effected" in Article 30(A)(3) of the license. That Article, after setting out the schedule of annual charges which had been fixed for periods ending in 1954, provides:

> Thereafter, until adjustment of the annual charges payable hereunder shall have been effectuated pursuant to the provisions of paragraph (D) of that Article . . . $175,000.[11]

The Commission relies upon the language of Section 10(e) of the Act, as amended, and of Article 30(D) of the license. The former provides, to repeat, that readjustment may be made "at the end of 20 years after the project is available for service," and the latter "at the end of twenty years after the beginning of operations under the license." The Commission interprets these provisions to require the language of Article 30(A)(3), relied upon by the Company, to mean only that until the readjustment proceedings are concluded the rentals shall continue to be paid as previously fixed, but that when the proceedings are concluded

---

[11] $63,375 was added in the third unit case in 1961, "effective as of December 1, 1954." This brought the rentals up from $175,000 to $238,375 prior to the present case.

the readjusted rentals may be made effective from the end of the 20 year period.

In support of its interpretation the Commission pointed out,

> To hold that no readjusted charge could become effective until promulgated after appropriate hearing not only would encourage litigation but would place a premium on delay, dilatory tactics and protraction of that litigation.

We find no reason to disagree with the Commission's interpretation of the statute. The readjustment "at the end" of the 20 year period in this case was for the period then beginning until the rentals would again be readjusted as permitted by the statute. A contrary position is not required in the interest of fairness to the Company. The Examiner's decision was rendered as long ago as August 4, 1966, and would have fixed the rental charges at $850,000 per annum. The Company was thus aware more than five years ago of the distinct possibility of a very substantial increase. Prior to 1966 there was a delay of several years due to the litigation of the Third Unit case, initiated by the Company and finally disposed of by this court in February 1962. Moreover, a substantial amount of time is necessarily involved in administrative and judicial processes in a matter of this kind. It is altogether reasonable to construe the statutory and license provisions, relied upon by the Commission, as authorizing the Tribes to receive for the period of the delays the increased rental found to be appropriate.

When in 1967 the proceedings eventuated in the Commission decision now under review, that decision was that the rental charges then determined were the reasonable charges to which the Tribes were entitled for use of their lands in 1959 and thereafter. The charges were not fixed as of 1967 and made retroactive to 1959. They were fixed

in 1967 as the amounts which were reasonable in 1959. Statute and license envisage that when it is decided by the Commission at the end of the 20 year period, or later at the end of an ensuing ten year period, to readjust the rental charges, they may be readjusted as of the beginning of the period, as here was done. Considerations may be advanced—see Judge Leventhal's separate and partially dissenting views on this phase of the case—for a different position, but other considerations support the position of the Commission. Thus, unless the Commission's position is sustained, the Tribes would be deprived of the rentals which represent the value to the Company of the use of their lands during the years covered. Moreover, in light of the result reached in this case, the probabilities are that a greater value had attached to the use of the lands for a significant period prior to the end of the 20 years, but payments representing the value could not be obtained by the Tribes. It is not possible accurately to measure such a matter, but neither is it possible to say that the rigidity of the 20 and 10 year periods, during which the payments cannot be changed, does not operate equitably for all parties; or in any event not so unevenly as to require the court to disagree with the Commission in its resolution of the problem.

V

The Commission fixed the readjusted annual rental charges to be paid by the Company to the Tribes at $950,000. The basic criteria are those of Article 30(D) of the 1930 license, which calls for

> . . . reasonable charges fixed . . . upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

Thus it was the task of the Commission, and this is not disputed, to determine the commercial value of the lands

to the Company for the most profitable purpose for which the lands were suitable. And there is no dispute that the most profitable purpose to which the Tribal lands could be devoted was the development of power.

Moverover, the Company does not dispute, except in the respect separately considered in Part VII, *infra*, the amounts of Company revenues representing value or income used by the Commission in arriving at the over-all values of Company operations. It does vigorously dispute the correctness of the allocation of those amounts among the several revenue producing operations of the Company, contending that too large a share was apportioned to Kerr. It contends that a quite different result would have been reached had not the amounts been subjected to the results of improperly formulated formulae. Thus, the basic difference between the Commission and the Company is over the methodology used by the Commission, not over the calculations made in applying the method adopted. The two theories most favored by the expert witnesses were the "net benefits theory" and the "profitability" theory. The former would require computation of the amount by which the annual cost of production of power at the Kerr project is less than the cost of producing a like amount of power by the most likely alternative at the time Kerr was constructed. Under the profitability theory there would be a determination of the share of the total electric revenues of the Company attributable to Kerr, less the annual cost of producing power at Kerr, including a reasonable rate of return on the net investment of the Kerr facilities, but not including in costs the rentals for the Tribal lands. The result thus reached would be the commercial value of Kerr to the Company. There would then be a determination of how much of this value should be attributed to use by the Company of the Tribal lands.

The Commission accepted the profitability method as the yardstick it would use. It was the method advanced by

the Tribes' witness Van Scoyoc. In applying this method, however, the Commission did not accept Van Scoyoc's calculations, and arrived at rental charges substantially below those the witness himself advanced.

A principal reason the Commission accepted the profitability theory, in preference to the net benefits theory, aside from its view of the reasonableness of the former in and of itself, was that the net benefits theory would call on the Commission to speculate as to the possibly alternative projects. Moreover, we think it important to note, the Commission, while following the analysis by the witness Van Scoyoc of the profitability theory, decided the case on the record as a whole, which contains a great deal of data from different sources. Included are results which would have been reached had the Commission followed the net benefits method, results which supported the reasonableness of the end result reached by the Commission.[12]

The basic test, however, is whether the profitability method was a reasonable one for the Commission to follow. We explain it more fully now, and consider the Company's principal objection to its use. A first step was to ascertain the Company revenues attributable to Kerr. The Company books did not assign revenues to the Company's several facilities. The Commission, however, ascertained the total electric revenues of the Company derived, respectively, from generation, transmission and distribution. This it did, as phrased in its brief, by assigning to each of these three categories "the costs assigned to each . . . including

---

[12] If the amount of rentals supported by the two expert witnesses for the Tribes, and the witnesses for the Secretary of the Interior and the calculations of the Commission staff, were averaged, the rentals thus proposed would have exceeded those fixed by the Commission. And if the amounts reached by the Company witnesses were included in the averaging the rentals proposed would have been approximately $880,000.

the average return on investment that the company's rates had generated in each year [1958-1964] studied." [13]

The principal objection of the Company is to the next step in the method used by the Commission. After the assignment of the Company electric revenues representing value, or income, to generation, an allocation was made to the Kerr generating facility of its share. Here the Commission, following the profitability method, added the factor of capacity in making the distribution of value to Kerr, thus, the Company contends, unduly augmenting the apportionment of generating values to Kerr in comparison with the other generating plants of the Company. We find this objection untenable. We think it was reasonable for the Commission, and not arbitrary as contended, to recognize the greater comparative generating capacity of Kerr in determining its value to the Company due to its use of the Tribal lands in which the Company had no investment and which are not included in its rate base. The license, as the Tribes point out, requires a rental based on ". . . commercial value of the tribal lands involved." The comparative output of electric energy of the several generating plants is an appropriate factor for Commission consideration in arriving at the respective contribution of each to the profits of the Company attributable to generation. Capacity of production, moreover, is a factor to be considered in the relative contribution of the several plants to the earnings of the Company.

---

[13] The Company described the manner in which the total generating revenues were reached as follows: "the Commission assumed that each dollar of investment . . . produced the same number of dollars of income." On this assumption the Company's revenues were assigned to groups of assets in proportion to the Company's investment in each, that is, to production, transmission and distribution. The Tribes state that this first step is more accurately described as an apportionment among generation, transmission and distribution of "operating income" rather than "revenues," for revenues are before expenses and income is not.

VI

After determining the value of Kerr to the Company there remained the problem of assigning to the Tribal lands their share of this value. This would be the annual rental to which the Tribes would be entitled.

The percentage of total Kerr value approved as rental for the Tribal lands in the Third Unit case, which was before this court in 1962, was 25 percent. *Montana Power Co. v. Federal Power Comm'n,* 112 U.S. App. D.C. 7, 298 F.2d 335 (1962). The Company contends that the reasons which led to that percent remain sound and should govern this case. The Commission, on the other hand, now found 42.13 percent to be more reasonable. An analysis of the reasons for the 25 percent in the Third Unit case convinces us that the percentage is not impregnable to an increase on the basis of the present record. The earlier decision attributed the annual "value" of the Kerr project one half to Tribal lands and one half to Company investment; and since the Tribes owned only half the lands under the project, and made none of the investment, their share was calculated as one half of one half, or 25 percent. This ignored differences in land values, particularly the special value of the narrow canyon, wholly owned by the Tribes, where the dam itself was constructed. Except for this, both Company and Commission agree on the basic division of values as one half to Company and one half to Tribal lands, for the land without the Company investment would see no Kerr project, nor would there be an investment without the Tribal lands.

The manner in which the Commission arrived at the 42.13 percent is as follows: Measuring electric generation in Megawatt months (MWM) the Commission considered the separate percentage values, so measured, of the damsite, the Flathead reservoir, and the upstream releases of water from Hungry Horse. Total power generation was determined to be 1194 MWM. Of this total 161 MWM were attributed to the natural stream flow (13%), 657 MWM to

Hungry Horse (55%), and 376 MWM to the Flathead reservoir (32%).[14] The amount, exclusive of the reservoir, is thus 818 MWM (161 plus 657) or 68.5 percent of the total. This percentage was assigned to the damsite, and half, or 34.25 percent, was then assigned to the Tribes because of their ownership of the damsite, and half to the Company because of its investment in the dam. The Tribes were also assigned one quarter of the value to the Company of the reservoir, because they owned half the land. This came to about 8 percent, which, added to the 34.25, totals the 42.13 percent. When this percent was translated into dollars it came to $950,000, the amount fixed by the Commission as annually due the Tribes as the rental charges for use of their lands.

The Company contends that the value of all the Hungry Horse releases of water was assigned to the Tribes in the above calculations, and that this was erroneous. While the total value of the Hungry Horse releases of water was assigned to the damsite, since the Company built the dam the total was divided one half to the Tribes because of ownership of the specially valuable natural damsite, and one half to the Company by reason of its investment in building the dam facilities there. We do not think this was an assignment to the Tribes of the value of all the water releases of Hungry Horse.[15]

Another objection of the Company is that the Commission attributed a separate percent (13 percent) of the Kerr

---

[14] The brief of the Commission states that the reservoir contributed 251 MW months, for a total of 1069, whereas the Company states the reservoir contributed 376 MWM, which would make a total of 1194 MWM. The parties agree on the percentages involved, and the figures used by the Company are accurate.

[15] The location of Hungry Horse upstream from Kerr materially increased the water power at the Kerr damsite. The Kerr value is materially increased as a consequence of its location in relation to Hungry Horse.

power production to the natural flow of the Flathead River, instead of considering the factor of natural flow as having merged with the factor attributed to the reservoir. This would be a valid objection only if the natural flow production (161 MWM) had been accounted for in the percent attributed to the reservoir storage (367 MWM), which we do not find to be the case. Treating the stream flow separately does not seem to the court to be unreasonable, for it makes a contribution independently of the Flathead reservoir; and its power contribution, like that of Hungry Horse, is due primarily to the dam at the site owned by the Tribes, rather than to the land under the reservoir,[16] of which the Tribes own only one half.

We conclude on the basis of the above analysis of the Company's principal objections, and also because the end result seems reasonable—in awarding to the Tribes 8% less than half the total value of Kerr in terms of power production—that the rental charges fixed by the Commission should be accepted as within its competence. The location of the Indian lands through which the river flows is the basic value ingredient of the Kerr project, which justified the Company's investments there.

VII

The Company also contends that the result reached by the Commission in calculating the Company's income attributed to Kerr, inflated by benefits derived from Hungry Horse releases of water, excludes the costs paid by the Company for the use of that water in the form of "head-

---

[16] The reservoir contribution of 376 MW months (*see* note 14, *supra*) contains an adjustment upward of 1.5, as the Commission states, to account for the fact that Kerr's "Storage should probably have some additional credit for re-regulation of releases from Hungry Horse, simplifying operations at Hungry Horse and daily and weekly bondage for Kerr Power Plant."

water benefits," totaling $670,000 in the relevant years.[17] The Commission agrees that these benefit payments are operating expenses. It states, however, that they are offset by payments to Kerr of headwater benefits by downstream plants. The Company counters by asserting that such payments were included in Kerr revenues. We are unable to find that the record supports the view that they were included in the revenues used in the calculations on which the Commission assigned the income attributable to the Kerr site. We take hold of no factual basis for overturning the Commission's resolution of this dispute. Moreover, there is some evidence that the Company received more in the form of net profit for headwater benefits it conferred than it paid for those it received.

VIII

In sum, the testimony of the witnesses upon which the Commission relied, and the added data placed in the record, give substantial evidentiary support to the amount determined by the Commission, and the several objections of the Company to the method used in arriving at the amount do not persuade us to disagree with the Commission except as to the item of interest, now considered.

IX

The Examiner concluded that the annual charges "shall bear simple interest at the rate of 4 percent per annum." The Commission raised this to 6 percent per annum from

---

[17] The Company also contends that having paid for the use of Hungry Horse releases it should not be required also to pay the Tribes "for the use of this [Hungry Horse] water made available by the United States." The Company's witness Seymour appears not to agree, since he attributed to the Tribes a share of the increased value of Kerr due to the Hungry Horse releases. In any event, the operating expense of the Company represented by benefits paid to the United States for the Hungry Horse releases does not obviate the increased value of the damsite on Tribal lands due to those releases.

the effective date of the readjustment, May 20, 1959, to be paid "on the difference between the rent it actually paid and that rent we have found to be fair and reasonable herein." The Commission stated that this rate accorded with its holdings in closely analogous situations, citing *Wisconsin Michigan Power Co.*, 31 F.P.C. 1445, 1462 (1964). In the Third Unit proceeding, however, involving this Kerr project, the Commission had provided for interest at only 4 percent per annum. It felt not bound now by that decision, stating that equity "requires selection of a rate of interest which more closely approximates the prevailing commercial rate of return, i.e., 6 per cent." But not only had the Commission in the Third Unit case fixed 4 percent, but in the present phase of the case, no doubt influenced by the rate the Commission had fixed in the earlier case, the Examiner also fixed the rate at 4 percent. In view of this situation, coupled with the fact that Congress has provided that rentals for the use of the Indian lands "shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of 4 per centum" (45 Stat. 200, 213 (1928)), we think equity calls for no more than 4 per cent now. The Order of the Commission will be modified accordingly. In so holding, however, we agree that the Commission was not absolutely bound by the Third Unit decision, and, moreover, our ruling is not to be interpreted as applicable to other cases or situations not before us. We hold, rather, that in the exercise of a sound discretion, the rate of interest found proper by the Examiner in this case should have been approved. Long delays in final resolution of the controversy, as evidenced by the understandable litigation of the jurisdictional question in *Montana Power Co.* v. *Federal Power Comm'n*, — U.S. App. D.C. —, 445 F.2d 739 (1970), argue that some part of the costs of the delay be divided among the parties, insofar as the rate of interest is concerned. We add in support that at least since 1962, when this court, in deciding the Third Unit case, approved the 4 percent annual interest rate, the Company has had

reason to believe that in regulating its affairs it would not be called upon to pay a higher rate in the present case.

X

The court is not without jurisdiction, as seems to be suggested by the Company, relying on the provision of Section 10(e) that the annual charges must be approved by the Secretary of the Interior, for our affirmance of the Order of the Commission, which is in full except for modification of the interest rate, is, as the Secretary concedes, binding upon the Secretary, and is not merely an advisory opinion. The Secretary had approved the Commission's determination of the amount of rentals to be paid by the Company. Moreover, here, as in the Third Unit case, the court's decision is on the merits of the Order of the Commission; that is to say, the Order stands free of any discernible "taint" emanating from the performance by the Secretary of his responsibility under the applicable statutory provisions. See *Montana Power Co.* v. *Federal Power Comm'n*, 112 U.S. App. D.C. at 12, 298 F.2d at 340.

The Secretary is a public figure who could not insist on withholding approval unless the rental rate to be paid were unreasonable. Considering the applicable statutes together he may approve a rental offered by the Company, and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination. As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review.

XI

In No. 21767, the Tribes contend that on the basis of the evidence that the excess of benefit payments to Kerr exceeds the costs of the headwater payments by Kerr, the

rentals to the Tribes should have been lifted by the Commission by some $42,000. The evidence relied upon by the Tribes, however, embraces a period which does not coincide with the study period used by the Commission. Primarily for this reason the Commission, we think properly, refused to revise its determinations to take account of the evidence relied upon by the Tribes, assuming its accuracy. With this we agree.

The Order of the Commission shall be modified as to the interest, as we have indicated. Otherwise it is affirmed.

It is so ordered.

TAMM, *Circuit Judge, concurring in part, dissenting in part:* I concur in petition No. 21,767 of the Tribes.

With respect to petition No. 21,904, I concur in Judge Fahy's analysis of all the issues (including retroactivity) except those discussed hereinafter from which I respectfully dissent.

I.

Section 10(e) of the Federal Power Act[1] provides that rentals fixed at the beginning of the license term may be "readjusted" at the end of twenty years. The Commission's view of this provision, approved by the majority, is that the entire analysis of annual charges may be made *de novo.* I cannot agree.

"Readjustment" is not a synonym for "fix anew." The term contemplates adjustment of an annual charge once reasonable, but now found unreasonable. It requires a finding that the former charge is unreasonable,[2] a statement of reasons for the finding and a modification guided by those reasons to accommodate the changed circumstances. *See California Oregon Power Co.* v. *FPC,* 99 U.S. App. D.C. 263, 239 F.2d 426 (1956). This is the only plausible interpretation of the statute. When a company has entered into a fifty year contract with substantial investment of capital, it does not, and should not, expect the slate to be wiped clean.

The legislative history of the Act clearly rejects the Protean approach adopted by the Commission. The purpose of the Federal Water Power Act[3] was to provide a "method by which the water [power] of the country . . .

---

[1] 16 U.S.C. § 791 *et seq.* (1964).

[2] The Commission did implicitly find the annual charges unreasonable sans reasons for the finding. J.A. 330, 374.

[3] Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063.

[could] be developed by public or private agencies under conditions which [would] give the necessary *security to the capital invested* and at the same time protect . . . [the] public interest." (Emphasis supplied.) H.R. REP. No. 61, 66th Cong., 1st Sess. 5 (1919). The Federal Water Power Act was passed to replace the ineffective General Dam Acts[4] which "provide[d] for and authorize[d] conditions upon which the [license] may be granted that render the terms of the investment so uncertain and . . . so defeasible that those having capital cannot safely and will not make investments under them." S. REP. No. 179, 65th Cong., 2nd Sess. 3 (1917). The majority's acceptance of *de novo* readjustment flies in the face of Congress' attempt to create investment security. Contractual evanescence without regard to precedent or practice discourages investment which in turn harms the public whom the Commission is charged with protecting.

The evil of readjusting annual charges *de novo* is pointedly illustrated by the Commission's treatment of the valuation problem. Although the parties expressly rejected the "profitability" method in their negotiations, (J.A. 183-4) the Commission nonetheless resurrected it.[5] I respectfully

---

[4] Act of June 21, 1906, ch. 3508, 34 Stat. 386; Act of June 23, 1910, ch. 360, 36 Stat. 593.

[5] The Examiner rejected the profitability method because *inter alia* the parties themselves had rejected it. J.A. 330, 334. The Commission, however, disagreed with the Examiner's finding, and instead relied upon the word "profitable" in a clause of the original contract referring to "the most profitable purpose for which [the land is] suitable, including power development," for the conclusion that "a form of profit sharing was indeed contemplated." J.A. 366-67. It is folly to contend that the phrase is intended to do anything but protect against an argument that the annual charges should be determined according to the value of the land for such purposes as farming.

suggest[6] that a matter as fundamental as profit sharing should not be imposed retrospectively on the Company absent clear guidance from Congress.[7]

This court has once before significantly altered the original contract between the parties in *Montana Power Co.* v. *FPC*, —— U.S.App.D.C. ——, 445 F.2d 739 (1970) (*en banc*). While I am bound by that decision, I note with dismay that this court has again taken its cutting shears to the contract. This court would do well to recall that we are dealing here with a contract, not thistledown or a transient cloud spun on gossamer. Contracts should provide constancy, not ephemerality. The past should be prologue, not postscript. By ignoring historical antecedents the Commission seriously impinges upon the traditional respect the law has accorded contracts. I would require consideration of the circumstances, commitments and arrangements that were a part of the original agreement as well as a statement of reasons for a finding of unreasonableness which would then serve as a guide for the readjusted charges.

II.

I also take exception to, and dissent from, the percentage of value assigned to the tribal lands.

In arriving at the tribal share the Commission considered three sources of power in the Kerr Project—

---

[6] Although I disapprove of the use of the profitability method, the error does not appear critical since according to the Commission the next most reasonable net benefits approach would have produced approximately the same value for the Kerr Project. J.A. 367.

[7] The net benefit method, approved by this court impliedly in the Third Unit case and by the Commission explicitly on several past occasions was cast aside by the Commission without adequate explanation. It is an elementary tenet of administrative law that an agency must either conform to its own precedents or adequately explain its departure from them. *See, e.g.*, C.B.S. v. FCC, Nos. 24,655 & 24,659 (D.C. Cir. November 15, 1971).

natural stream flow, Flathead reservoir and Hungry Horse releases. The land underlying the first is wholly owned by the Tribes. The second is equally divided between the Tribes and the Company. The third is owned by neither the Tribes nor the Company.

The Commission determined that the total power generation of the Kerr Project was 1194 Megawatt months (MW). Of this total 161 MW were assigned to the natural stream flow, 376 MW to the Flathead reservoir and 657 MW to Hungry Horse.

The Commission then proceeded to arrive at the sharing formula of 42.13% in two steps. First, the Commission divided the units of production on the basis of 50% for development and 50% for ownership. Then, the Commission again divided the ownership shares so that the water power generated refracted the land interests.[8] The initial split is not in controversy. The latter is however.

Taking the three sources of power and the total generation seriatim, the Commission calculated the tribal share as follows. The Flathead reservoir, which was assigned 376 MW, was divided in the first step on a 50/50 basis resulting in a tribal ownership share of 188 MW. This ownership share was again divided by half since the Tribes owned 50% of the reservoir land, to arrive at a total of 94.0 MW. The stream flow, which was assigned 161 MW, was divided in the first step by half resulting in a tribal share of 80.5 M.W. Since the Tribes owned all of the land underlying the stream flow, they were assigned all of the 80.5 MW in step two. Hungry Horse which was assigned 657 MW was also divided in the initial step by a half thereby creating a tribal share of 328.5 MW. However, in the second step the Commission suddenly departed from its formula by assigning to the Tribes all of the

[8] The Commission adopted the method of witness Stanley E. Sporseen which is explained at J.A. 20-1, 26.

328.5 MW despite the fact that neither the Tribes nor the Company owned the land from which the Hungry Horse releases originated.[9] It is this calculation from which I must dissent.[10] I concur in the Commission's observation that the value of a "parcel of realty depends not only on its intrinsic worth, but also upon its location relative to other realty." J.A. 373. However, the Hungry Horse releases flow not only over the tribal lands, but also over that of the Company. Furthermore, the reservoir, partially owned by the Company, makes possible the full use of Hungry Horse and it is the Company's system as a whole which through the Pacific Northwest Coordination Agreement makes possible the realization of much of the value of the project's generation. There was no justification for assigning all of the value of Hungry Horse to the Tribes.

Cognizant of the heavy burden petitioner must bear in seeking to reverse a Federal Power Commission decision,

---

[9] Hungry Horse, upstream from Kerr, is a development owned by the government which substantially increases the power generation capacity of Kerr.

[10] Graphically, the Commission's 42.13% tribal share is derived as follows:

FACTORS:

Natural Stream Flow (100% tribal land)	161 MW
Flathead Lake Reservoir (50% tribal land)	376 MW
Hungry Horse (0% tribal land)	657 MW
	1194

FPC TREATMENT:	Development/ Ownership Split (50-50)	Water Flow/ Land Refraction Split	Total
Natural Stream Flow	(.50 x 161) = 80.5	(1.0 x 80.5) =	80.5
Flathead Lake Reservoir	(.50 x 376) = 188	(.50 x 188) =	94.0
Hungry Horse	(.50 x 657) = 328.5	(1.0 x 328.5) =	328.5
			503.0

$$\frac{503}{1194} = 42.13\%$$

and of the importance of the end result, *Montana Power Co.* v. *FPC*, 112 U.S.App.D.C. 7, 298 F.2d 335 (1962), I am nonetheless forced to conclude that the Commission's action is unreasonable and not supported by substantial evidence. *Cf. Mississippi River Fuel Corp.* v. *FPC*, 82 U.S.App.D.C. 208, 163 F.2d 433 (1947). Although my analysis may seem laborious, it is necessary, for it illustrates that a small miscalculation can create substantially different results. For example, if the Company were assigned half the value of Hungry Horse in the second step,[11] the tribal share would have been reduced to 28% with an annual charge of approximately $631,000 as opposed to the $950,000 the Commission granted.[12]

While I wholeheartedly agree that the Tribes are entitled to an increase in the annual charge, that increase should be fair and reasonable. We must never lose sight of the fundamental truth that the ultimate burden of increased annual charges must be borne not by the Company, but the consumer.

LEVENTHAL, *Circuit Judge, concurring in part, dissenting in part.* While I concur in most of Judge Fahy's opinion for the court, I conclude that the adjustment in rentals wrought by the Commission's order may properly be effective as of the date of its notice of hearing, but I do not think a basis has been laid for making it retroactive to expiration of the 20-year term.

My reasoning begins with the observation that this is a lease, with provision for an independent determination

---

[11] The Company owned approximately half the land in the Kerr Project.

[12] On the assumption that the damsite is more valuable than the other land in the project, if the Commission assigned the Company ¾ of the value of Hungry Horse in the second step, the tribal share would be approximately 35% with an annual charge of approximately $786,000.

of rentals if the parties cannot agree. To me, this calls for the premise that the rentals should be known. Since the lease does not specifically provide for retroactivity of adjustment, there is merit in the approach that the lessee should know what the adjustment in rental is going to be so that he can decide whether he will occupy the premises. This is theoretical, to be sure, since obviously Montana Power will not quit the premises, but it provides a starting point. And I think it is a different starting point from the familiar situation where the power company is the applicant, for a specified power rate increase put into effect, possibly after a suspension period, subject to recapture.

Even so, retroactivity is permissible for good reason. The FPC gave a reason (JA 365)—that retroactivity is necessary to avoid a premium on litigating delay. However, retroactivity to the date of notice of hearing (1965) also avoids that result.

I see no reason for additional retroactivity to 1959, on the basis of implication, except for an increase to "reflect *known changes*"—calculated by Mr. Seymour to result in $270,000 (see JA 363). Any additional retroactivity to 1959 means that the Company is exposed both to the possibility of a new rental-determining method, which in and of itself I think is unobjectionable, and to its retroactive application, which I think raises problems at least so far as any theory of implication and intent of the parties is involved.

The FPC also said (JA 357) the Company could have avoided injury by maintaining a reserve account. The Company's application for rehearing says (JA 398-9), there was no justification for setting up a contingent reserve prior to the filing of the testimony in October 1965, and that in a rate proceeding neither the Montana Commission nor the FPC would have allowed such a contingent reserve, since the contingency could not be readily calculated. I'm

inclined to think the Company has the best of this argument. If it is true that the Company could not have used a contingency reserve in a rate case—and I think it likely—it does seem to me to present at least a general basis for assuming no retroactivity—unless the FPC makes a showing as to why retroactivity prior to the date of the notice of hearing is fair.

The Examiner says (JA 321) that the Company in fact earned enough to absorb the increase in annual rental. But it is for the Montana Commission to say what revenue is appropriate, considering this expense. I don't think the rental for this site should be increased because of what the state commission allows on other properties.

Reverting to the FPC's judgment of full retroactivity for its $950,000, I am also troubled by a legal assumption of the FPC which said (JA 357) that the Act "contemplates that any readjustment ultimately determined becomes effective upon the date which marks the completion of the first twenty years after the project is available for service." This outlines in effect a legal requirement of retroactivity. I think this is an incorrect legal assumption.

The FPC's legal assumption of retroactivity, set out above, is strangely at odds with its conclusion (JA 361)—"that a prescribed charge will continue as the lawful charge under Section 10(c) until demonstrated to be inappropriate." This was said to make clear the FPC would not make a new adjustment effective May '20, 1969, as § 10(c) permits. But the language is evocative of the familiar doctrine that a rate continues until it is set aside as unreasonable. I think that is the "common law" or "common lore" of the regulatory approach that should be followed unless a basis is set forth for reaching a contrary result.

In saying that no basis has been put forward for full retroactivity for 1959-65, I am aware that there was liti-

gation during this period over the third unit. The FPC did not refer to this as a reason for Montana Power's liability for retroactive adjustment, and I think wisely so. Certainly Montana Power is not responsible for the delay between September 18, 1959, when the FPC fixed an added $50,000 rental, and January 30, 1961, when the FPC raised this to $63,375, due to the objections of the Secretary of Interior and a reopened proceeding. The one year's delay before this court affirmed on January 25, 1962,[1] was not only modest in duration, but provided the only opportunity for court consideration of prickly points. The Commission waited until 1965, to begin a hearing on overall rental adjustment. Perhaps this was due to a conclusion like that reached in Opinion No. 529, Oct. 4, 1967, when it stated that no readjustment would be made as of May 20, 1969, unless a showing were first made that the charge was inadequate (JA 361).

Perhaps this was due to its own needs, for allocating staff to energy projects it considered of higher priority. But this was a tribunal not selected by the Company but imposed upon it. In the absence of a showing that the Company is somehow implicated in the Commission's delay in noticing the docket for hearing, I do not think the Company should be under an obligation to pay increase in rental for that period except as to known changes.

* * * *

While I concur in the affirmance of the FPC's allocation as to the Hungry Horse releases of water, I would like to add to what is in Judge Fahy's opinion. First, any discussion of Hungry Horse must be taken in the context of the Company's real claim before the FPC—that Hungry Horse should be excluded entirely. The FPC rejected that, and we think this is sound. The issue is as to the value

---

[1] Montana Power Co. v. FPC, 112 U.S.App.D.C. 7, 298 F.2d 335 (1962).

of the land, and its place utility in terms of the river, in the light of current conditions as to the river.

The secondary question is, assuming account is taken for the increase in production at the Kerr Hydro-Electric Development from the releases of the up-stream Hungry Horse waters, how shall this be allocated as between the Kerr basic plant and the Kerr storage reservoir. The need for allocation rises from the fact that at the basic plant the Tribes have a 50% interest, reflecting their ownership of the land, with the Company getting 50% credit for capital invested. At the Kerr reservoir storage, where the Tribes own only ½ the land, the Tribes' percentage is only 25%.

The FPC apparently followed the approach of Mr. Sporseen, witness for the Tribes, who testified that he had followed the method of the Columbia River Coordinating Committee.

His allocation approach began with the energy quantities for Kerr basic plant without storage (161 MW months), and Kerr reservoir storage (251 MW months). In apportioning the 657 MW months for Hungry Horse release, he began with a credit to Kerr reservoir storage of 125 MW months bringing Kerr reservoir storage up from 251 to 376 MW months (1.5 x 251).

The remainder, and bulk, of energy from Hungry Horse waters (532 MW months) was credited to Kerr basic plant. Mr. Sporseen's analysis, simplified, is as follows (JA 12): A plant can be built without any reservoir, using the natural stream flow. If this basic plant gets the use of a reservoir, it makes payment for the assist to its production. We also make a calculation of the assist given to the production of power at the plant from the water released upstream.

I don't think the reservoir is entitled to a credit merely because the new waters are "flowing through" the reser-

voir. Let me illustrate: Suppose a power plant is given a boost in production when a dam (A) is constructed 20 miles up river. Suppose later a new dam (B) is constructed 30 miles up river. Would dam A be entitled to credit for all the releases from dam B because they pass dam A on the way down to the usage point? I think not.

A final point, concerning a problem that occurs to me as a result of recent litigation on another waterway, see Alabama Power Company v. FPC, — U.S.App.D.C. —, 450 F.2d 716 (1971). My thought is that neither party to the lease should be able to claim that the use of the Kerr storage should be reduced because there is now available a more efficient means of assisting power production in the form of the Hungry Horse waters. However I don't believe this to be a problem in the record before us, as Mr. Sporseen's use of data of "critical period energy" (JA 11) presumably assumes full use of the Kerr reservoir in addition to the contribution of the Hungry Horse water.

[Filed Feb. 17, 1972]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 21,904

THE MONTANA POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

CONFEDERATED SALISH AND KOOTENAI TRIBES, ETC., SECRETARY OF INTERIOR, *Intervenors*

No. 21,767

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

MONTANA POWER COMPANY, *Intervenor*

Petitions for Review of an Order of the Federal Power Commission

Before: FAHY, Senior Circuit Judge, and TAMM and LEVENTHAL, Circuit Judges.

Judgment

These cases came on to be heard on the record from the Federal Power Commission, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Power Commission on review herein is hereby

modified to provide for an interest rate of no more than 4 per cent. As modified, the order is hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Nathan J. Paulson
Clerk

Dated: February 17, 1972.

Opinion for the Court by Senior Circuit Judge Fahy.

Opinion by Circuit Judge Tamm, concurring in part and dissenting in part.

Opinion by Circuit Judge Leventhal, concurring in part and dissenting in part.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,904

THE MONTANA POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, SECRETARY OF INTERIOR, *Intervenors*

No. 21,767

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

THE MONTANA POWER COMPANY, *Intervenor*

ON REHEARING EN BANC

Decided July 15, 1970

Before: BAZELON, *Chief Judge*, WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON and MACKINNON, *Circuit Judges*, sitting *en banc*.

LEVENTHAL, *Circuit Judge:* These cases involve the readjustment of the annual rentals due Indian tribes for the use of tribal land by a power company in connection with its operation of a hydroelectric project licensed by the Federal Power Commission.

For convenience we provide a brief introductory sketch of the central issue: The license issued in 1930 provides

for readjustment of rental charges, after 20 years of service, based on the commercial value of the tribal lands for the most profitable purpose for which suitable, including power development. In 1930 the pertinent statute provided that the Commission shall fix a reasonable annual charge for the use of tribal lands and that after 20 years of service the "charges may be readjusted . . . in a manner to be described in each license." The particular license provided for adjustment by agreement of the licensee, the Commission and the Secretary of the Interior, or failing agreement by submission to arbitration. In 1935, after the Commission had been reorganized as an independent regulatory agency, the statute was amended to provide that such charges shall be fixed by the Commission, and after 20 years of service, may "be readjusted by the Commission . . . upon notice and opportunity for hearing" and subject to opportunity for judicial review. Montana Power contends that this clause is applicable only to licenses issued subsequent to the 1935 statute. We hold that the 1935 statute, which made no changes in the substantive standard applicable under outstanding license for readjustment of tribal land charges, intended to prescribe the Commission as the tribunal for readjustment under outstanding as well as future licenses. Section 28 of the act, which provides that amendments of the act shall not affect licenses theretofore issued, does not preclude a change in procedure unless there is a showing, which we do not find in this case, that the prior procedure was bargained for as a significant element in the license agreement.

I. Background Facts and Procedures

Moving to a fuller statement of the background facts and procedure, we note that the license dated May 23, 1930, was issued to Rocky Mountain Power Company, a wholly owned subsidiary of the present licensee and operator, Montana Power Company ("Company"), for works

at Project No. 5, the Kerr Dam, and other facilities of the Kerr hydroelectric project, located at the southern side of Flathead Lake, Montana. The Company used the lands of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana ("Tribes").[1] The original license for works at Project No. 5 was issued on May 23, 1930, for a term of 50 years, pursuant to the Federal Water Power Act of 1920,[2] and the Act of March 7, 1928.[3]

We defer a more specific reference to pertinent provisions of the license and statutes, and set forth the procedural stance of the controversy.

On May 19, 1959, the Tribes filed with the Commission a petition for readjustment of the rentals, paid by the Company under its license. The license, as issued in 1930, and thereafter amended by the parties, permitted readjustment at this time. In 1965 the Commission set

---

[1] The Flathead Reservation, consisting of about 1,300,000 acres in western Montana, and including the southern half of Flathead Lake, was created by the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975. The Tribes own the land on which the Kerr Dam and powerhouse are located, as well as the lands underlying the southern half of the Lake. The lake provides storage capacity at 1,217,000 acre feet.

[2] The Federal Water Power Act of 1920, 41 Stat. 1063, 16 U.S.C. §§ 791-823 (1964), generally authorized the issuance of licenses to operate projects for development of power on bodies of water subject to jurisdiction of the Congress or on any part of the public lands and reservations of the United States.

[3] The 1928 act, 45 Stat. 200, 212-13, the Interior Department Appropriation Bill, 1929, contained, *inter alia*, a proviso "that the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or license or licenses for the use, for the development of power, of power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects."

the matter for hearing. Montana Power filed suit in the District Court for Montana to compel compliance with the arbitration provision of the license and for appointment of an arbitrator. That court dismissed, holding that it would not have jurisdiction unless it was held in the proceeding pending before the Commission, subject to review in a court of appeals, that the arbitration provision in the license controlled.

The proceeding before the Commission went forward in 1965, with extensive evidence presented by the Tribes, the Company, the Secretary of the Interior, and the Commission staff.

The Examiner's decision issued on August 4, 1966. On October 4, 1967, the Commission rendered Opinion and Order No. 529. The Commission, which largely agreed with the Examiner, held that the arbitration provision was not controlling, and readjusted the annual charges payable by Montana Power to the Tribes from $238,375 to $950,000, with the increase retroactive to May 20, 1959. Applications for rehearing were filed by the Company and by the Tribes. On November 3, 1967, the Secretary of Interior signified his acceptance of this order, without prejudice to application for rehearing by the Tribes. On March 22, 1968, the Commission entered its order denying rehearing.

A petition to review was filed by the Tribes in this court with respect to one portion of the order (No. 21767). The Company's petition to review (No. 21904) objected to the level of readjusted charges set by the Commission, and also presented a threshold contention that the Commission was without jurisdiction to entertain the proceeding to readjust the charges. A division of this court issued an opinion which ordered the Commission to dismiss the readjustment proceeding for want of jurisdiction. Suggestions for rehearing en banc were filed by

the Commission, the Tribes, and the Secretary. This court ordered rehearing en banc, limited to the jurisdictional issue. This court en banc holds that the Commission had jurisdiction over the proceeding, and schedules further proceedings before the court.

II. Pertinent Provisions of Statute and License

The license was issued under and in accordance with the provisions of the Federal Water Power Act (*supra*, note 2), which authorized the Commission to issue licenses for the purpose, *inter alia*, of constructing dams, power houses, or other project works, for the utilization of power from bodies of water over which Congress has jurisdiction, or upon any part of the public lands and reservations of the United States (§ 4). Section 6 of the Act provides that licenses shall be issued for a period not exceeding 50 years. The 1930 license established a 50-year term and authorized construction of three generating units aggregating not less than 150,000 hp. to be completed within three years.

Section 10 provides that all licenses shall be on certain prescribed conditions. Subsection (e) relates to charges payable by the licensee. The provisions relating to what might be called the usual fees charged by the Commission, for administration and for use of Government property, are not involved in this case; indeed they were waived for the project by the 1928 law (*supra*, note 3). What is particularly before us is a proviso of § 10(e) that refers to the special case of a user charge payable "when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations." As enacted in 1920, this proviso continued—"the commission shall fix a reasonable annual charge for the use thereof, and such

charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license."

The license issued in 1930 by the Commission, which then consisted of the Secretaries of War, Interior, and Agriculture (*see* 41 Stat. 1063), contained terms which had received the specific approval of the Secretary of the Interior as required by the special 1928 law pertinent to the Flathead Reservation tribal lands (*supra*, note 3). Article 30(A) set forth the annual charge as a flat fee, rising in amount from $60,000 in the first two years, through various steps, reaching $175,000 per year for the 16th—20th years "and/or until readjustment" pursuant to (D). Article 30(D) provided for readjustment of annual charges after 20 years (1) by mutual agreement between the Commission and the licensee, with the approval of the Secretary of the Interior, or (2) failing that, by arbitration in the manner provided for in the United States Arbitration Act, 9 U.S.C. § 1 ff. (1964).

Article 30(D) further set forth as the governing criterion —"such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."

When Congress passed the Public Utility Holding Company Act of 1935, it retained the Federal Water Power Act of 1920 as Title I of the Federal Power Act.[4] Most of the provisions of the 1920 law were carried over wholesale, but there were a few changes. Specifically, the proviso of § 10(e) for licenses involving Government dams

---

[4] Act of August 26, 1935, 49 Stat. 838; *see* 16 U.S.C. § 791a *et seq.* (1964), as amended (Supp. IV, 1969).

or tribal lands within reservations, was amended, as indicated in the footnote,[5] so as to read that—

---

[5] As amended in 1935, the law provides:

Sec. 10. All licenses issued under this Part shall be on the following conditions:

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fixed a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horse-

the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as pro-

---

power installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

As originally enacted in 1920, § 10(e) provided:

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced with Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: *Provided*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for

vided in section 16 of the Act of June 18, 1934 (48 Stat. 984)—fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing.

Section 28 of the Act,[6] which was not changed, provides:

> The right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

III. Considerations Underlying the Court's Conclusion of Applicability to Existing Licenses of Commission Readjustment Procedure Prescribed in 1935 Amendments

It is the 1935 provision for readjustment of annual charges "by the Commission" that was invoked by the petition of the Tribes filed with the Commission in 1959, and by the Commission in its order of readjustment of charges that is brought here on petition to review. Mon-

---

State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

[6] 16 U.S.C. § 822 (1964).

tana Power claims the 1935 readjustment provision is inapplicable because, when the original license was issued in 1930, the statute provided only for readjustment of charges "in a manner to be described in each license." It appeals to § 28 of the Act as showing the Commission is without jurisdiction to readjust charges. It says this conclusion is required in order to avoid a constitutional and statutory thicket.

A

The 1920 Act marked a change in national policy, a Congressional determination to go beyond merely forbidding obstruction to navigation and to achieve instead a comprehensive development of national resources. But it was marred by deficiencies in administration and implementation. And so changes were made in 1930 and 1935. *Niagara Mohawk Power Co.* v. *FPC*, 126 U.S.App. D.C. 376, 378, 379 F.2d 153, 155. The 1930 change was one whereby the Commission was reorganized and became an independent regulatory commission, instead of a committee of cabinet officers—the Secretaries of War, Agriculture and Interior.[7]

As to the 1935 law, the pertinent committee reports show that the changes in § 10(e) are intended to make explicit that readjustment of charges imposed by the Act "shall be made by the Commission." The Senate Report[8] states:

> Several minor changes are made in section 10(e), relating to the charges to be paid by licensees. The

---

[7] Act of June 23, 1930, 46 Stat. 797.

[8] S. Rep. No. 621, 74th Cong., 1st Sess. 45 (1935).

The subsequent House Report, H.R. Rep. No. 1318, 74th Cong. 1st Sess. 24 (1935) is virtually identical. The pertinent paragraph reads:

> There are several minor changes in section 10(e) relating to the charges to be paid by licensees. The amount to be fixed for the purpose of reimbursing the United States for the cost of administration is limited to the present amount by the pro-

charge to be fixed by the Commission for the purpose of reimbursing the United States for the cost of administration is limited to the cost of administering this part of the act, instead of the entire act. This makes no change in the present situation, but confines the charges to those needed for the administration of the water-power provisions. The amendment also makes explicit the authority of the Commission *to adjust from time to time all charges imposed under the act. In the proviso that charges for licenses involving the use of Government dams shall be adjusted at the end of 20 years, there is introduced* for the purpose of clarification the provision that *such readjustment shall be made "by the Commission"*; this time is to run from the time "the project is available for service" instead of from the beginning of operations, as the latter date is subject to postponement by the licensee. Finally, the Commission is authorized to allow a credit for any overpayment of charges which may have been made in preceding years. [Emphasis added.]

Licenses involving use of tribal lands are in the same proviso, of course, as licenses involving the use of government structures.

So far as can now be gleaned, from the briefs of counsel and our own researches, Congress did not expressly ad-

---

vision that the base is the cost of administering this part of the act, not the entire act, which would include the new parts II and III. The Commission's authority to adjust all charges from time to time is made express. *It is also made clear that the adjustment of charges for licenses involving the use of Government lands shall be made "by the Commission"*: the time of such adjustment is calculated from the time the project is available for service, instead of from the beginning of operation; and the Commission is authorized to allow a credit for any overpayment of charges that may have been made in preceding years. [Emphasis added.]

dress itself to the issue of the applicability of the amended § 10(e), providing for Commission readjustment, to the problem of a pre-existing license containing a procedure for readjustment solely by agreement or arbitration. The court is unable, then, to discern any specific legislative intent, one way or the other, as to the precise issue now before us.

That being the case, the court must discern the applicable legislative intent by what is necessarily an act of projection—starting from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue before us.[9]

The question is by no means an easy one. We must consider what basic pattern of administration of § 10(e) was likely to have been foreglimpsed by the legislature. We must take into account that the legislature described its changes as "minor," and that the Company considers the replacement of a court-selected arbitrator by a federal commission as a change that is far from minor and adversely affects its "rights" under the license which § 28 of the act solemnly protects. We must consider the constitutional aura of the Company's contentions, and fundamental considerations of fairness.

Taking these various elements into account, our effort to discern applicable legislative intent leads us to these conclusions:

First, § 28 protects the licensee from any change in, and the legislature did not intend to authorize any change in, either the substantive duties or rights of the licensee as already determined, or any of the criteria or standards

---

[9] *See* City of Chicago v. FPC, 128 U.S.App.D.C. 107, 113, 385 F.2d 629, 635 (1967); Eastern Airlines, Inc. v. CAB, 122 U.S.App. D.C. 375, 379, 354 F.2d 507, 511 (1965); *see also* Gray, The Nature and Sources of the Law 173 (1963 ed.); Cordozo, Nature of Judicial Process 15 (1921).

specified for the license. This much the Commission concedes, and it has already made clear that the annual charges specified in pre-1935 licenses are not subject to increase. Annual Charges Payable by Licensees, 31 F.P.C. 1555 (1964).

Second, *in general*, so far as matters of procedure are concerned, the amendments were intended to be applicable to all determinations made subsequent to the date of amendment. In general, we conclude that changes in the tribunal or forum for making (readjustment) determinations were intended to be applicable to all subsequent determinations.

Third, the legislative intent expressed and preserved in § 28 establishes an exception in the case of any specific license for which the prior procedural system had either been bargained for as a right or had otherwise been established as a matter of such importance that its removal raised problems of fairness. We do not find this kind of specific exception available in the case before us.

Fourth, we think this view of the statute fully preserves the Company's constitutional rights and guarantees.

We proceed now to a fuller discussion of these manifestly inter-related propositions.

Our view of both the statutory scheme and constitutional requirements is supported by *Pennsylvania Power & Light Co. v. FPC*, 139 F.2d 445 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 (1944). There the company contended "that the Federal Water Power Act, under which the license was granted, did not entrust the Commission with control of the licensee's capital accounts, but merely of the project accounts and that even as to project accounts final determination of project cost or net investment was entrusted by the original act to the district court rather than to the Commission." The court disagreed and in its opinion, written by Judge Maris, said (at 453):

> We see no merit in these contentions. * * * [T]he licensee had no vested right to have its investment

determined by one procedure rather than by another at least so long as it was accorded a right to be heard and an ultimate judicial review. Accordingly the change of procedure which the 1935 amendment brought about did not, as applied to the present proceeding, violate the Fifth Amendment. Crane v. Hahlo, 1922, 258 U.S. 142.

The court considered no additional discussion necessary insofar as the contention of Pennsylvania Power & Light —that there was a prohibition against use of the new forum (*Commission rather than District Court*) and procedure specified in the 1935 act—was rested on § 28 of the Act as well as constitutional considerations.

Pertinent precedents include *Crane* v. *Hahlo*, 258 U.S. 142 (1928), cited by Judge Maris, and *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.*, 284 U.S. 151, 159 (1931), wherein Justice Stone relied on *Crane*.

These precedents show that when all that is involved is a change in tribunal, when a determination by a court is replaced by a final determination, subject only to limited court review, of a board of officials (*Crane* and *Pennsylvania Power & Light*) or arbitrators (*Glidden*), the change in remedy does not partake of impairment of "vested rights." These precedents establish that the legislature's substitution of arbitration for a commission, or vice versa, is a permissible change of remedy (assuming limited judicial review) and does not constitute a general alteration of rights not fairly subject to divestment.[10]

---

[10] Although there are of course differences in the types of matters referred to arbitrators or official boards, the principles permitting substitution of one mechanism for another would not seem affected by the circumstance that what was involved is a determination of fair rental value, as in the case at bar, or damages from street improvements, as in *Crane* v. *Hahlo*, or of amount of loss suffered from a fire, as in the *Glidden Co.* case.

Any contention that there is a right to a determination by an official appointed by the court, rather than officials nominated by

So far as constitutional problems are presented by the issue whether a legislature's change in arbitration remedy is applicable to contracts previously entered into, the applicable jurisprudence may appropriately be found in, *e.g.*, *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N.Y. 261, 262, 130 N.E. 288, 290 (1921) wherein Judge, later Mr. Justice, Cardozo said:

> Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.

In § 28 Congress gave assurance that it would not make any amendment that "shall affect any license theretofore issued . . . or the rights of any licensee thereunder;" We do not think § 28 was intended to preclude change in remedy and procedure on the ground that they necessarily "affect" the vindication of the license, even though, as every lawyer knows, available procedure may make a difference in result, *e.g.*, whether he has pre-trial or prehearing discovery. We do not think it is the fair intendment of Congressional will to read § 28 so broadly as to constitute a general prohibition against changes in the procedure or machinery applicable to a license, changes that do not have the quality of changing substantive rights or obligations.

As to licenses involving use of either Government dams or lands of Indian tribes we think that the 1935 insertion

---

the President and confirmed by the Senate, verges on the trivial, and is in any event answered by the *Pennsylvania Power & Light* decision. That company's reliance on § 28 of the Act was advanced at p. 41 of its brief to the 3d Circuit according to a statement in the Commission brief not contested by the Company. It is notable that *Crane* v. *Hahla* upheld transfer of function from a court to a Board of officials of the very city against which the claim was made, appointed by the mayor.

in § 10(e), expressly putting the function of readjustment of rentals in the hands of the commission, applies to the generality of all such licenses outstanding.[11] The only effect of § 28 is to carve out an exception for those cases where the prior-established procedure had the quality of a substantive "right," *e.g.* in instances where specifically bargained for by the licensee, a matter that we shall separately consider under part III, C of this opinion.

Reverting to the general interpretation of § 10(e) we must bear in mind that any of the constructions presently contended for by the parties before us still leaves § 10(e) as involving only a "minor" change—as compared with the context of the far-reaching changes in national power policy wrought by this law, the Public Utility Act of 1935. The construction we think proper for §§ 10(e) and 28 gives application to this statute of the general principle that a prescription of procedure or machinery (and here the explicit designation of the tribunal assigned with decisional responsibility), is to apply across the board to all matters later set for decision, whether under new or existing licenses. We see no basis for concluding that the applicability of this general rule is negatived by either express language or the power of an inference from context.

Montana Power says that the substitution of a commission for an arbitrator can hardly be called "minor." The word must be considered in context. The Public Utility Act of 1935 wrought far-reaching changes in national electric power policy, not only the famous "death sentence"

[11] During fiscal year 1935 the Government collected fees from licensees for the use of federal dams and lands of Indian tribes totaling $218,185.39. (This is exclusive of fees paid by licensees who used public lands and national forests.) These amounts were paid pursuant to 36 outstanding licenses involving either land of Indian tribes or Government dams; seven of these licenses involved payments in excess of $1,000.00 (the amount payable under Project 5 during the construction period). Fifteenth Annual Report of the Federal Power Commission 37-45 (1935).

for public utility holding companies, but also in Title II, a substantial extension of the Commission's jurisdiction. Instead of limitation to hydroelectric projects in navigable streams (and Federal lands) the Commission was given regulatory control over interstate activities of operating electric utilities, and Congress also set up machinery for Federal assistance to State regulatory commissions. It is in this context that we must consider the change made in § 10(e), which had previously provided that charges be set by the commission and "readjusted in a manner described in the license." This language had been stretched to provide not only a manner for readjustment of charges (which would have included, say, a readjustment formula) but also a change in locus of responsibility for prescribing charges, to a person or agency other than the commission.

Whatever reasons may have impelled use of another agency prior to 1930 when the commission consisted of three busy cabinet officers and had conflict-of-interest type problems,[12] in 1930 the Congress reorganized the commission as an independent regulatory agency. The statutory revision made clear that the decisional responsibility assigned to the commission embraced not only the original charge but the readjustment of charges. In another context this change might have prompted more elaborate consideration and discussion. In the context of the far-reaching changes in the 1935 legislation it is not hard to see why the change was described as a minor clarification.

The context of the present statute gives further support to the general presumption for across-the-board applica-

[12] The Secretary of Interior was not only guardian of the Tribes affected by projects on Indian reservations, but was also head of the department that contained the Bureau of Reclamation interested in projects using Government dams. The Secretary of Agriculture headed a department containing the Forestry Service responsible for lands used in electric projects. The administration of Commission licenses involved problems of irrigation and reclamation.

tion of procedures by virtue of the fact that otherwise different procedures and tribunals would be required for different aspects of the same project, or for plainly interrelated projects. This is not a merely theoretical consideration. As this court has pointed out with respect to Montana Power's existing project on the site obtained from the Tribes—"The Commission does not necessarily license all the project works of a given project at one time." *Montana Power Company* v. *FPC*, 112 U.S.App. D.C. 7, 11, 298 F.2d 335, 339 (1962).[13] The Company conceded, and could hardly deny, that as to the new post-1935 license which it obtained from the Commission (*see* note 13, *supra*), responsibility for adjustments rests solely in the Commission. There is no reasonable basis for supposing that the legislature would have intended to assign responsibility in part to the Commission and in part to an arbitrator. As appears from the experience in 1929 and 1930, the calculation of user charges and determination of the value of the site comes to involve, *e.g.*, calculating cost of horsepower produced there and making comparison with alternatives, determination of the share properly applicable to the land owned by the Indians and to the Lake waters, and determining the extent of Lake water value to be attributed to the Indians (the Lake waters being owned in part by the Indians and in part by the State). In these and other matters it cannot fairly be presumed that the legislature contemplated responsibility assigned in part to the Commission and in part elsewhere, with the possibility of conflicting approaches tending to hamper rather than attain a fair result.

---

[13] That case involved the circumstance that the 1930 license was amended to provide for two units. After construction of these was completed, in 1949, Montana Power constructed and in 1954 began operating a Third Unit, albeit it had not obtained requisite licensing authorization. The Commission amended the Kerr license nunc pro tunc in 1961, and required annual payments of $63,375 for additional use of Tribal lands from 1954.

Uniformity of administration of federal water power permissions was, after all, the reason why in 1920 there was gathered in a single (cabinet-level) commission the different jurisdictions theretofore exercised by the War Department, which controlled the developments in navigable waters, the Department of Agriculture, which controlled the power sites located in the extensive mountainous regions in the national forests, and the Department of the Interior, which administered the projects on Indian reservations and public lands. It would be an anomaly indeed if the 1930 transfer of functions to an independent commission, as the increasing number of projects and problems demanded excessive time of cabinet members, followed by the 1935 enlargement of functions entrusted to that commission, were to be interpreted to require a dispersion rather than a centralization of responsibility for those functions.

Our approach does not assume for a moment that the availability of arbitration is a matter of only trivial consequence. It is important enough to be unaffected by the accident of diversity of residence of the parties and the fact that diversity permits removal from an ordinary state court to a federal court (which is treated in diversity cases as a particular kind of "state" court). *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956). But this conclusion, as is plain from *Bernhardt*, does not depend on whether the right to arbitration is labeled as either a substantive "right" or a matter of procedure.

While the availability of arbitration may not turn on an accident of forum within a state, it certainly may properly be affected by the legislature's subsequent establishment of a different and appropriate procedure as exclusive. We refer again to Judge Cardozo's opinion in *Berkovitz* v. *Arbib & Houlberg, Inc.*, *supra*.

C

We have carefully considered, and we reject, Montana Power's alternative contention that in this particular license the arbitration provision had been "bargained for as a major element in the agreement, and [is] hence a vested right" which Congress could not and did not take away.

The materials cited to us reveal that there was considerable study and negotiation over the amount of annual rentals that would be fair to the Tribes, and whether they should be on a flat basis or depend on actual use of facilities. A flat schedule was finally agreed to.

There is no showing by the Company that arbitration was "bargained for", or that this was anything more than a convenient way of providing for readjustment of rentals by an objective tribunal in case the parties could not agree.

The record contains, and we have examined, Flathead Power Development, Memorandum on the Development of Flathead River Power Sites, Montana, Sen. Doc. 153, 71st Cong. 2d Sess. (1930) (hereafter referred to as Sen. Doc.). The Senate Document contains a memorandum dated December 30, 1929, by J. Henry Scattergood,[14] Assistant Commissioner, Bureau of Indian Affairs, addressed to Secretary of Interior Wilbur and the Federal Power Commission pertaining to the two pending applications for development of Flathead River Power sites—one from Rocky Mountain Power Company, and one from Walter H. Wheeler. This memorandum concluded that both applicants had made inadequate offers of Indian rentals—a view later supported by a separate Army study made at the request of Secretary Wilbur and of the Commission.[15]

---

[14] This memorandum appears in Sen. Doc. 1-47. Our review also draws on his supplemental memorandum dated May 14, 1930 addressed to Secretary Wilbur, Sen. Doc. 49.

[15] Sen. Doc. p. 49.

The context of further negotiations is focused by observations in this memorandum, which may be set forth as follows:

The Flathead case was of great importance to the Indians in establishing principles. The Federal Power Commission, Secretaries of War, Agriculture and Interior, had a new executive secretary and new general counsel. Two Senators and two Congressmen addressed the Commission at its hearings. Special care had to be taken because in addition to the interests of the licensee and the "general consuming public," the only two parties normally involved in power site leases under the Federal Water Power Act, consideration had to be given to the interest of "the Indian tribe, which is entitled to a fair rental for the use of the power sites."

A license to Mr. Wheeler, a civil engineer of good standing and excellent record of accomplishment would provide "development advantages" of attracting new industries to the region, which would be in competition with the Anaconda Copper interests closely allied with Montana Power. (Sen. Doc. pp. 3, 46-47.)

Wheeler offered $1.125 per horsepower-year, which would yield $118,125 annual rental for Site 1 on an estimate of 105,000 hp., a high efficiency ratio and a 100% utilization factor. The Company offered $1 per horsepower-year. It estimated 20,000 hp. for Site 1, and a utilization factor of only 85% reducing hp. produced to only 68,000 hp., and average "spot" rental of only $68,000.[16]

However, Mr. Wheeler's payments were seen to be limited by the fact that his costs were in the same range as those of the Company (close to $14 per horsepower year). Moreover, Wheeler's selling price could not exceed $15 to attract new industry (perhaps $16.34 to Mountain States Power), and this could leave no room for the Indians to

[16] Sen. Doc. pp. 12-13, 14 (table), 50.

seek a higher rental (pp. 29, 32). Rocky Mountain Power on the other hand had an intercompany price of $18, an advantage to the Indians (p. 32). The Montana Power System had an immediate need for capacity (indeed had had a shutdown due to a recent dry season), and the Flathead site represented the optimum site available to the Company, with the cheapest power at the powerhouse and largest volumes (pp. 4-5).

Accordingly the Indian Bureau put forward the view that the economic rental value of the site should be expressed as the difference between the generating cost of service (including fair return to the Company), and the inter-company price, and this amount should be divided between the Indians and the general public in proportion to their respective interests, the Indians owning the land sites and the part of the Lake within the reservation, and the State of Montana owning the rest of the Lake and the right of water use. Assuming the Indians' interest as 50% (rounding out a calculated 46.5%), this would yield the Indians $2.25 per horsepower, on an annual average of 80,500 hp. (Sen. Doc. 9, 34). And the possibility of increased rentals was heightened by the Company's statements at the hearing that the $1 offer was a "nominal" and "arbitrary" offer, based on the fact that this was the customary charge of the Forest Service—which had no trust obligations to the Indians (Sen. Doc. 37).

So much for Scattergood's memorandum dated Dec. 30, 1929. The Senate Document reveals that there then ensued four months of discussion in 1930 on the basis of a different approach—a combination of fixed charge and energy charge. Mr. Scattergood's May 14, 1930 supplemental memorandum to Secretary Wilbur[17] notes that several plans were put forward with this type of schedule:

---

[17] Sen. Doc. p. 49 *et seq.*

one by the Commission in its schedule of January 2, 1930; one by the Army engineers, on an independent study requested by Secretary Wilbur, submitted February 27, 1930, and revised March 20, 1930; and one by the Indian Bureau, in its Schedule 2, dated April 1, 1930, discussed by the Secretary with the Montana delegation. The approach of minimum fixed rental to a given horsepower development, plus an energy charge above that point, amounted to a profit-sharing contract that gave the Indians large revenues at high output and the risk of too little at low brackets. Mr. Scattergood's analysis continues (Sen. Doc. p. 51):

> Furthermore a number of difficulties were encountered in all these profit-sharing plans in providing against any possibility of the use of the Flathead plant for peaking purposes only or in dull times the giving to it of only a reduced proportion of the entire system load, and in general the avoiding of the temptation to starve this plan in order to reduce the Indian rental. Four months of negotiations were consumed in discussing those various plans and the variables upon which they were based and we were never able to reach an agreement. Several deadlocks actually developed with the breaking off of negotiations. Finally efforts on these lines were abandoned and a new approach was entered upon with the plan of a flat rental.

And so a flat rental basis was finally agreed to. It reduced risks to the Indians. And it avoided involvement by the Indians with having to monitor the management of the hydroelectric project. As Mr. Scattergood puts it, the flat rental approach "avoids the difficulties of assuring to the Flathead plant its fair proportion of system load" and "avoids any inducement that Flathead be used for peaking purposes, or that it be starved unduly at high water periods when other plants of the system could carry an increased share of the load." (Doc. pp. 51-52.)

With this change in approach to a flat rental schedule [18] the problem of readjustment of rentals, which had previously been visualized as in the nature of implementation of a predetermined formula with new operating data, now became an open-end agreement to negotiate and submit to arbitration. The Company's brief notes (pp. 15-16) that this proposal was made by the Secretary of the Interior and promptly agreed to by the Company and the Commission. This recourse to arbitration was in the context of an open-end agreement, with the parties simply unable to agree on a "formula" approach for rentals that would not excessively monitor or trammel corporate management, yet would be fair to the Indians.[19] The readjustment of flat

---

[18] The schedule agreed on by the parties and contained in the license is:

For the first two years	$ 60,000 per year
For the third year	75,000 per year
For the fourth year	100,000 per year
For the fifth year	125,000 per year
For the next five years	150,000 per year
For the next five years	160,000 per year
For the next five years and/or until readjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this Article 30	175,000 per year

[19] The Company's brief is skillful but wholly unwarranted insofar as it makes, and seeks to gain some support from, this statement (at Br. 18): "The Commission's proposal included a provision that would have given it somewhat the same jurisdiction over readjustments that it now asserts. Report, p. 63, R. ref. 8291. Its proposal was not adopted."

These are the facts shown in the record. First, both applicants put forward a rental schedule of a specified fixed rate per horsepower produced, which had been estimated at a "spot" of production. (Sen. Doc. p. 49.) This approach was rejected.

Next, a number of rental plans were put forward, which contained a "Combination of a fixed rental plus an energy charge." There was a plan put forward by Army engineers; and a plan

fee rentals could not be left either to the Company, or to the Secretary of the Interior, or to the Commission of which he was a member.

After the issuance of the license in 1930, however, Congress reorganized the Commission.[29] It no longer had the

---

initiated in the Indian Bureau. The first proposal for such a plan appears in a memorandum dated January 2, 1930, prepared by F. E. Bonner, executive secretary of the Commission. (a) This was a personal memorandum, as appears from his reference to "my judgment" of development cost (Sen. Doc. p. 60). (b) The memorandum was tentative, to stimulate discussion of the fixed rental plus energy charge approach. "In the event the Commission decides to authorize a license for site 1 in the above case, it appears that the following may offer a rough outline of a logical method for determining the reasonable charge to be fixed for the use of the Indian land. * * * While merely tentative and probably embracing some defects, it should at least be helpful in offering something tangible for further study and discussion." (Sen. Doc. pp. 59, 61.)

The "fixed rental plus energy charge" was rejected because of the problems of encroachment on the Company's managerial discretion, and fluctuation in income for the Tribes. It was because of these difficulties that four months negotiations led to deadlock, with negotiations broken off, and then a decision to embark on the new approach of flat rental. Sen. Doc. p. 51, quoted in opinion, *supra* at pp. 24-25.

This solidly documented history shows that the parties simply could not agree on initial rentals, for the first 20 years, on a "fixed rental plus energy charge" approach.

There is absolutely no basis for conjecturing whether, if the parties could have gotten together on the initial approach for the first 20 years they would have been unable to agree on the subsidiary concept, also proposed by Mr. Bonner, but without any discussion, of entrusting to the Commission the task of making the readjustment to apply the basic approach agreed on for the first 20 years to the subsequent period. There is certainly not the slightest basis for hinting that such Commission readjustment was not acceptable to the Company.

[29] Act of June 23, 1930, 46 Stat. 797.

Secretary of the Interior or any other Cabinet officer as a member. They, it appeared, had been "so burdened with the tasks of their immediate departments that they have not had the time necessary for the work of the commission."[21] Indeed the Commission was no longer confined to the partisan membership of the appointees of one Presidential administration. It was established as a conventional independent regulatory five-man commission, bi-partisan, with staggered terms. It was organized as a full-time commission with full-time, expert staff. By the time of the amendments to § 10(e) as part of the Public Utility Act of 1935, the Federal Power Commission's status as an independent regulatory commission with expertise was a matter of some years' duration, and its standing was reflected in the 1935 law which significantly enlarged its jurisdiction.

The record does not provide the affirmative showing necessary to support a claim that the interposition of the Commission in this case would violate § 28, as taking away the essence of a bargained-for right. What the parties bargained about for months was the attempt to reach a demand-plus-energy schedule, and this was abandoned. With the adoption of a flat rental schedule, all parties were in agreement on the need for an objective means of determining readjustment charges if the parties were unable to agree. The device of providing for agreement, and arbitration in the event of inability to agree, was simply the conventional device used by business contractors to obtain an on-going agreement and the assurance of an objective tribunal without a special economic interest. As such it does not differ significantly from the device of setting a reasonably definite standard, as the parties did in this

[21] Sen. Rep. 378, 71st Cong., 2d Sess. p. 2.

case,[22] and leaving application of the standard to the courts if the parties themselves could not later agree on its application.[23]

We see nothing in the negotiations, or in the license itself, to suggest that the arbitration provision was more than simply a means of achieving the goal of impartial application of the general standard embodied in the license. This was the goal, too, of § 10(e), and whether the change of forum was from the District Court to the Commission, as in *Pennsylvania Light & Power*, *supra*, or from an arbitrator appointed by the District Court to the Commission, as in the case at bar, the essential purpose of both Congress and the parties to the license agreement is satisfied by our interpretation. All that is changed is the tribunal: from a court-appointed arbitrator under this license (perhaps from a court itself under another license) to an independent, bi-partisan expert commission subject to judicial review. The Commissioners were by law precluded from engaging in any other business or employment, or from holding any official relation to any license or any pecuniary interest therein. 16 U.S.C. § 792 (1964).

There is no specific indication in the record why the parties preferred an arbitrator appointed by the court to decision directly by a court. Traditional reasons would include the greater speed, informality, and flexibility of the arbitral process. The same factors were generally considered in 1935 to attach to the expert independent commission. Perhaps there was a disinclination to take the risk that the readjustment language might be thought too

---

[22] The license provides that the "readjusted annual charges [are] to be reasonable charges fixed upon . . . the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."

[23] See Corbin on Contracts § 99 (1963). There are decisions that may be read as indicating that such a standard is too indefinite for judicial enforcement, but they apparently constitute a minority view.

indefinite to be enforceable by a court (compare note 23, *supra*); this risk would not be applicable either to an arbitrator or the Commission. These traditional reasons for arbitration certainly provide no basis for interposing § 28 as a mandate to carve an exception out of the across-the-board procedure set forth in § 10(c). And that disposes of the case before us in view of the absence of a showing of any other reason why the parties chose arbitration—the kind of reason that would be significant enough to warrant application of the kind of protection afforded by § 28 to substantive rights and would be frustrated by the procedure specified in § 10(c).

So far as this case is concerned the members of the Commission did not have the disqualification formerly attaching to the Secretary of the Interior as special guardians of the Indian tribes. The Commission was established as an agency with broad stewardship over various aspects of the public interest—including sound development of water resources, and concern for the general consuming public—as well as the function and capacity for fair treatment of individual parties before it, whether licensees or Indian landlords. Looking to the essence of the situation, we see no showing that the designation of this commission as the body to determine readjustment of rentals under the outstanding licenses derogates from rights safeguarded by § 28 of the act.

IV. Other Matters

1. To avoid misunderstanding we emphasize that we are not casting doubt on the authority of this commission, or other regulatory agencies, to take account of efforts of parties to settle differences by agreement or arbitration.

The flexibility that is part of the genius of administrative law and procedure may warrant an agency's staying its proceeding while the parties negotiate toward a settlement agreement, or while their arbitrators grapple with the

matter. The award would have the same legal significance as an agreement between the parties. *Compare Brotherhood of Railroad Trainmen* v. *Akron & B.B.R. Co.*, 128 U.S.App.D.C. 59, 74, 385 F.2d 581, 596 (1967), *cert. denied*, 390 U.S. 923 (1968). This would at the very least be a strong "advisory" effect, and in practical terms it might permit the commission to grapple much better with its prodigious work load.

This kind of flexibility, like the commission's use of negotiated settlements, takes account of the significant difference between these two approaches in the settlement of controversies. An administrative agency, like a court, depends on reasoned disposition, on application of general rules and standards to the facts of a particular matter. Arbitration may proceed by that judicial type of disposition, but it may also partake of the kind of consensual disposition which prevails among businessmen, or in the relations between business and labor, and for that matter even in the halls of the legislature. Arbitrators do not have to give reasons.[24] In some types of matters that may be an advantage. It is commonplace that parties may be able to agree on a particular result more readily than they can agree on a statement of the general approach that harmonizes with the particular result. "The parties may be disposed to avoid the expense and distractions of litigation if the various rates reached in a settlement do not constitute a binding admission or ruling on principle." *City of Chicago* v. *FPC*, *supra*, 128 U.S.App.D.C. at 119, 385 F.2d at 641.

These considerations point to the possibility that a commission might properly conclude that for certain issues the public interest is better served by limiting devotion of the time, staff, and resources of an adjudicatory independent

---

[24] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960); *cf.* Intl. Assn. of Machinists v. Natl. Mediation Board [*National Airlines*], —— U.S.App.D.C. ——, —— F.2d —— (Jan. 30, 1970).

regulatory commission, and by providing more scope for agreement of the parties (including arbitration).[25] But such a judgment made by a commission on assessing all the factors when the matter is presented for decision, is far different from the Company's claim that the proceeding was never properly before the Commission for decision—and this by virtue of an agreement made before the Congressional amendments specified readjustment as a function for the commission.

2. The view we have taken of the legal issues makes it unnecessary to consider the contention that the Company's ability to claim "rights" secure against Congressional alteration on August 26, 1935, is undercut by its default at that time under the license then outstanding.[26]

---

[25] Company counsel has lodged an exhibit that reveals that the license issued by the Commission to the Portland General Electric Company for a project involving the use of lands of the Warm Springs Indians provided for readjustment of Indian rentals by arbitration, pursuant to the agreement of the parties made in 1955 and amended in 1961. 26 F.P.C. 192. We are not called upon to consider whether this complies with § 10(e). In any event, we are not aware of any instances in which an independent regulatory agency deferred its decision-making to an arbitration proceeding where it was considered as one of the parties to the arbitration.

[26] Rocky Mountain Power had failed to complete construction within the 3-year period provided in the 1930 license, even as extended for an additional two years by Amendment 1 in 1932. The Company's motion of February 16, 1935, for an extension from May 1935 to 1938 failed to obtain the approval of the Secretary of Interior, and was denied by the Commission on April 1, 1935. The Commission ordered the matter referred "for appropriate legal action" to the Attorney General who had authority to institute proceedings for revocation of a license. Fifteenth Annual Report of the Federal Power Commission 178-79 (1935). These facts are all set forth in the recitals to Amendment No. 2, issued by the Commission July 17, 1936, after approval by the Secretary and acceptance by the Company.

The record shows that one of the reasons why the Interior Department preferred the Company's proposal over Mr. Wheeler's

3. The Company contends that this court cannot have jurisdiction if, as the Secretary contended before the Commission, he has a "veto" power permitting him to withhold approval of either the Board's order or this court's order on review. *See Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). To avoid dismissal of its petition to review, the Company refers to the veto as a reason for requiring the arbitration remedy. There are difficulties with the company's contention, including the point that it is difficult to square with this court's 1962 exercise of jurisdiction in the Third Unit case, (*supra*, note 13).

As the case comes to us it contains the Secretary's acceptance of the Commission's Opinion and Order 529, notwithstanding its rejection of contentions put forward by the Secretary, but without prejudice to the Tribes' continuing to urge their contentions. Before this court the Secretary has disclaimed any right to disapprove the ruling of this court.

In our view this disclaimer is only what the law requires. The Secretary will be bound whether we affirm the Commission's ruling on the merits, or hold in favor of the Company's contention on the merits, in whole or in part.

The Secretary's approval under the 1928 law (*supra*, note 3), like the approval of the Secretary and of the Indian

---

was the earlier date in which the Company would be able to begin construction and service. Sen. Doc. pp. 37-38.

Amendment 2 reduced the project to two generating units, and provided for a new schedule of payments the Company had worked out in an agreement reached with the Tribes, which had in 1935 been organized as a self-governing tribe under the Indian Reorganization Act of 1934. 48 Stat. 984, 25 U.S.C. §§ 461-479 (1964). Annual rental payable, originally limited by a peak rent of $175,000, was increased to figures exceeding $175,000 for each of thirteen years. Also the Company agreed to give preference to members of the Tribe in hiring of employees for both construction and operation of the power project.

Tribes referred to in § 10(e) of the Act, is manifested initially by the concurrence with the licensee which must exist in order for the application for the original license (either as filed, or as modified to take account of objections found in the original filing) to be approved by the Commission. It is manifested as to readjustment of rentals by the filing with the Commission, or acquiescing in presentation to the Commission, of an application requesting readjustment. The readjustment decision is made by the independent regulatory agency assigned this function by Congress, subject to review by the court of appeals. After approval of the presentation of the application for readjustment the only further recourse of the Secretary or the Tribes is the right of appeal provided by law for the correction of errors made by the commission.[27]

The case will now proceed to the merits. Since a member of the original division, Honorable Warren E. Burger, is no longer a member of this court, his place will be taken by another member of the court selected by lot in accordance with the long-standing procedure prescribed by resolution of the Judicial Council. The case will be reargued on the merits to the division thus constituted.

So ordered.

BAZELON, *Chief Judge*, concurring: I admit to substantial doubt whether Congress in 1935 ever considered the precise situation we face today. Likewise, I cannot say that a change in forum might not, in other circumstances, give rise to constitutional problems at least of such magnitude that

---

[27] It cannot sensibly be contended that the "approval" required under the 1928 law required the Secretary to approve each readjustment of rentals. If that were so, the Secretary could not validly have entered into the arbitration agreement in 1930.

The "approval" of the original license, either under the 1928 law or under the provision to § 10(e), carries with it approval of the procedure for readjustment that has been either prescribed by, or established in accordance with, the Congressional enactment.

we would be constrained to interpret ambiguous statutory language so as to avoid the constitutional question. I agree, however, that § 28 of the Act was not intended to preserve the particular forum in which a given dispute is to be adjudicated; and that the 1935 amendment may be applied to the present case without constitutional difficulty. On that basis I join Judge Leventhal's opinion.

TAMM, *Circuit Judge, with whom Circuit Judges* MCGOWAN *and* MACKINNON *join, dissenting:* My views concerning the proper disposition of this case require a more complete statement of the historical background and factual context of this controversy than is contained in the majority opinion.

Prior to 1920, the development of water resources as a potential source of electric power was governed by provisions of the General Dam Acts, 34 Stat. 386 (1906), 36 Stat. 593 (1910). Under these Acts, the right to alter or amend the licenses of power projects was reserved by Congress, and no rights vested in licensees. This policy rendered investments in power projects quite speculative, thereby deterring public investors from providing the capital needed to develop the nation's water power resources. Congress soon became aware of these shortcomings in the existing law and undertook an exploration of alternative solutions to the problem. One of these new proposals was S. 1419, which ultimately became the Federal Water Power Act of 1920. In the Senate Report accompanying this bill, the existing statutory scheme was sharply criticized because it provided for the imposition of "conditions upon which the permit may be granted that render the terms of the investment so uncertain and . . . so defeasible that those having capital can not safely and will not make investments under them." S. REP. No. 179, 65th Cong., 2d Sess. 3 (1917). A proponent of the Federal Water Power Act noted that the new approach taken in the 1920 Act was designed to provide a "method by which the water powers

of the country . . . can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect . . . [the] public interest." H.R. REP. No. 61, 66th Cong., 1st Sess. 5 (1919).

The primary method that Congress chose for safeguarding the security of investments under the Federal Water Power Act was embodied in section 28 of that legislation, which provided:

> [T]he right to alter, amend, or repeal this Act is hereby expressly reserved; *but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.*

41 Stat. at 1077 (emphasis added). The 1920 Act also contained provisions which stated that licenses could be issued for a term of not more than fifty years, and that "when licenses are issued involving the use of . . . tribal lands . . . within Indian reservations the [Federal Power] commission shall fix a reasonable annual charge for the use thereof, and such charges shall be readjusted at the end of twenty years thereafter *in a manner to be described in each license* . . ." 41 Stat. at ——. The Commission had occasion to review the effect of these provisions and the Congressional intent underlying them in *Annual Charges Prescribed for Licensees Under the Federal Power Act*, 31 F.P.C. 1555, 1557-58 (1964):

> The legislative history of the Federal Water Power Act reveals several important efforts to include a provision enabling the Commission to adjust annual charges. Initially, Rep. Sherley of Kentucky succeeded in amending H.R. 16053, 63rd Cong., 2d Sess. (1914) to provide:
>
> > The Secretary of War may provide as a condition of such approval for the payments to the United

States of reasonable annual charges for the benefits that accrue to the grantee . . . and *at the end of twenty years, and every ten years thereafter, the Secretary of War may readjust the annual charges as may then be just and reasonable.* [Citing 51 CONG. REC. 12,759 (1914); (emphasis added by the Commission).]

When the House was considering H.R. 3184 which, as amended, became the Federal Water Power Act, the Sherley Amendment had its sequel in the unsuccessful Little Amendment . . . .

Representatives Small of North Carolina and McArthur of Oregon opposed the Little Amendment in [the floor] debate on the ground that it would discourage investment in the hydro-electric industry. Representatives Ferris of Oklahoma and Sims of Tennessee argued that since the Commission could provide for adjusting annual charges in the licenses, the Little Amendment was unnecessary. Representative Sims made it abundantly clear that adjustment was not possible without a license provision allowing it:

Mr. Little. *But they have to do it when they issue the license or they forever forfeit any chance to adjust the charges to changing conditions.*

Mr. Sims. They have to put it in the license. [Citing 58 CONG. REC. 2223 (1919) (emphasis added),]

The Little Amendment was rejected, and H.R. 3184 was passed and sent to the Senate.

The Senate report on the bill proposed an amendment which, while it would have confined the purposes for which annual charges could be fixed, would have permitted their periodic adjustment [by the Commission]. . . . The Senate in approving H.R. 3184 adopted

> this amendment. The House being in disagreement with the Senate Amendments, the bill was referred to conference committee, in which . . . the language as finally enacted in subsection 10(e) was worked out . . . .
>
> The legislative history thus shows that Congress rejected the two proposals which would have expressly authorized the Commission to adjust annual charges, even though both proposals contained a minimum period for successive adjustments.

It would be difficult indeed to imagine a clearer or more specific expression of congressional intent to immunize license provisions, particularly those relating to readjustment, from unilateral governmental action beyond the ambit of the methods and criteria specified in the individual license.

In the same year that the Federal Water Power Act was passed by Congress, the Montana Power Company approached the Government regarding the possibility of obtaining a license to construct and operate a hydroelectric project on the Flathead Reservation. (*See* S. Doc. No. 153, 71st Cong., 2d Sess. 3 (1930).) The lengthy negotiations described in the majority opinion ensued, and the record of these negotiations leaves no question that the problem of finding a workable method to determine a fair rental charge for use of the Flathead site was one of the hardest issues confronting the parties. The Commission, the Army Corps of Engineers, and the Bureau of Indian Affairs all made various proposals during the period from January 2, 1930 to April 1, 1930; in all, "[f]our months of negotiations were consumed in discussing those various plans . . . and [the parties] were never able to reach an agreement. Several deadlocks actually developed with the breaking off of negotiations." (J.A. 183-84.) Finally, the parties agreed upon a flat rental system because this method assured the Tribes

of a stable income throughout the fifty-year term of the license. The rental was set at levels which increased at the end of the second, third, fourth, and fifth years of the project, then increased again at two intervals of five years each, and finally reached the sum of $175,000 per year "[f]or the next five years and/or until readjustment of the annual charges" required by the Federal Water Power Act after twenty years of operation. (J.A. 184-85.)

The readjustment provision ultimately incorporated into Article 30(D) of the license stated that the readjustments in the rental amount mandated by the Federal Water Power Act would be effected "by mutual agreement between the commission and the licensee, with the approval of the Secretary of the Interior. In case the licensee, the commission, and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in the United States arbitration act . . . ." (J.A. 186.) This provision supplanted an earlier Commission proposal under which readjustment would have been made "upon the facts *as found by the commission* at such times of readjustment." (J.A. 203; emphasis added.)

When the Federal Water Power Act was amended to become part of the Federal Power Act in 1935, section 28 of the former Act, guaranteeing the preservation of rights vested in existing licensees, was carried forward into the new legislation without any change. At the same time, section 10(e) of the 1920 Act, which had provided that readjustments were to be made "in a manner to be described in each license," was amended to state that readjustments of the annual charges were to be made *by the Commission*. The amendatory language on its face is wholly prospective, and, as I read it, reflects no Congressional intent to abridge inconsistent readjustment provi-

sions contained in outstanding licenses.[1] Both the House[2] and the Senate[3] Reports accompanying the amendments describe the changes as "minor" and "clarifying"—language that is surely a classic understatement if it is designed to convey an intent to let the Commission rewrite readjustment provisions in all existing licenses. In fact, I think it is fair to say that the available evidence indicates that Congress did not intend to affect license provisions like the one in question, and that the majority's interpretation of the legislative history rests upon questionable or erroneous inferences.

On its face, section 28 of the 1920 Act is designed to protect *all* rights granted in licenses issued under that legislation, not just those provisions which a court or a different Congress might later deem "important": this section uses careful disjunctive phrasing to provide that subsequent legislative action will not "*affect any license* theretofore issued . . . *or the rights* of any licensee thereunder." The lengthy summary of the legislative history of the 1920 Act

---

[1] Section 10 of the Act, which is now codified in 16 U.S.C. § 803 (1964), states:

> *All licenses issued under . . . this title shall be on the following conditions:*
>
> . . . .
>
> (e) . . . [*W*]*hen licenses are issued* involving . . . tribal lands embraced within Indian reservations the Commission shall . . . fix a reasonable annual charge for the use thereof, and such charges may . . . be readjusted by the Commission . . . upon notice and opportunity for hearing . . . . (Emphasis added.)

See also 16 U.S.C. § 799 (1964):

> Licenses under . . . this title shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter . . . .

[2] H.R. REP. No. 1318, 74th Cong., 1st Sess. 7, 24 (1935).

[3] S. REP. No. 621, 74th Cong., 1st Sess. 17, 45 (1935).

quoted above clearly indicates that the Congress which first enacted section 28 would not have believed or intended that the present result could be reached under that legislation. The majority concludes, however—by inferring Congressional intent from evidence that is admittedly equivocal—that Congress apparently meant something quite different by the language of section 28 when it reenacted this provision in 1935: now the Commission would be permitted to readjust all rental amounts even though a different method had been specified in the license.

Even if I could accept the theory that (1) after 1935 section 28 was limited to protecting only those license provisions which the Commission and the courts would deem "substantive" or "important," and (2) rental readjustment provisions in licenses issued under the 1920 Act are not prima facie within this category by virtue of the strong legislative history of the 1920 Act and the congressional silence in 1935, I still would not be able to agree with the majority's analysis of the interests at stake in this case.

The majority asserts that the arbitration clause is "remedial," which renders it procedural and hence defeasible, absent some exceptions which will be discussed below. I believe that this characterization misconceives the function of the arbitration clause in Montana Power's license. Clearly, such an inquiry into the purpose and functional role of the provision is necessary here; for, as Judge (later Justice) Cardozo said in *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N.Y. 261, 271, 130 N.E. 288, 290 (1921):

> The word "remedy" itself conceals at times an ambiguity, since changes of the form are often closely bound up with changes of the substance. . . . The problem does not permit us to ignore gradations of importance and other differences of degree. In the end, it is in considerations of good sense and justice that the solution must be found.

See also Guaranty Trust Co. v. *York*, 326 U.S. 99, 108 (1945): "Neither 'substance' nor 'procedure' represents

the same invariants. Each implies different variables depending upon the particular problem for which it is used."

At the outset, it is clear from the *Erie* doctrine cases and the majority opinion that even where arbitration is clearly being used as a remedial device—most familiarly, in resolving disputes over the construction or performance of contracts by recourse to an impartial third party—it "substantially affects the cause of action" and "may make a radical difference in ultimate result." *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 (1956); *see also Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 539 (1959). Thus, even under the majority's analysis, it is clear that the company may well be forced to pay substantially greater rentals for thirty years out of the fifty-year term of the license than it would be if the arbitration clause were given effect. This fact, standing alone, should make us extremely wary of the Commission's facile attempts to dismiss the clause as merely "procedural."

However, I think it is perfectly clear that the arbitration clause in Montana Power's license is different in fact and function from the majority's characterization of it. Unlike the typical arbitration clause that is used to resolve contract disputes, this provision is *not* triggered by one party's claim of breach; rather, it is used as a method of defining a key term in the license at a specified future time, as mandated by the Federal Water Power Act of 1920. The Supreme Court has observed the validity of a similar distinction, while not making it determinative, in cases involving alleged impairments of the obligations of contracts:

> The provisions [of the contract] dealing with forfeiture, which is one of the State's *remedies in case of breach,* and reinstatement, which is the purchaser's *remedy to cure his breach, both operate* on the rights of a party *after breach and thus concern the enforcement of the contract. In this sense they are remedial* and the statute of repose challenged here is an alteration of remedy rather than obligation.

City of El Paso v. *Simmons*, 379 U.S. 497, 506 n.9 (1965) (emphasis added). As a term-fixing mechanism, the arbitration provision was not intended to be used only for extraordinary contingencies such as a claim of breach, but rather was designed to be employed during the normal course of performance in the not-unlikely event that the parties were unable to agree upon an adjusted rental amount. One need look no further than the hornbooks to be reminded that this is a familiar practice in contract law:

> In the process of negotiating an agreement, a term that is most frequently left indefinite and to be settled by future agreement, or by some other specified method, is the price in money . . . . If the parties provide a practicable, objective method for determining this price or compensation, not leaving it to the future will of the parties themselves, there is no such indefiniteness or uncertainty as will prevent the agreement from being an enforceable contract.
>
> . . . .
>
> It is sufficient if the agreement provides that the price shall be the amount that arbitrators or that X, a specific third person, shall fix as a fair price.

1 CORBIN ON CONTRACTS 423-25, 435-36 (1963). Additionally, the inquiry which would be made pursuant to Montana Power's arbitration clause is significantly different from having an arbitrator determine how a disputed contract term should be interpreted or what damages should be assessed for breach. In the latter situation, there is typically a relatively narrow question, and a relatively large body of principle to guide the decision. Here, although the majority leaves intact the license provision stating that readjusted rentals are to be based upon "the commercial value of the tribal lands involved, for the most profitable purpose for which suitable," it is clear that valuation problems for hydroelectric projects of this kind are extremely vague and complex and that the foregoing standard offers little help

in resolving them. This is amply demonstrated by the nature and volume of the arguments which the parties have addressed to the merits of the Commission's rental readjustment, and, unforunately, I suspect that it will also be reflected in any opinion rendered by the division of this court which is assigned to pass upon the merits. Because of this lack of readily ascertainable standards guiding the inquiry, the qualities and characteristics of the tribunal making the decision become *pro tanto* more important to the parties; and in this regard it must be remembered that the Commission was a party to the original agreement, albeit in somewhat different form.

Therefore, I believe that it is clear on the face of the license and the legislative history that the arbitration clause is "important" enough, even under a narrow reading of section 28, to survive the 1935 amendments; and I think that this conclusion is supported, rather than controverted, by the record of license negotiations. Before examining this question in detail, however, I think it should be emphasized that the preliminary negotiations provide a much less reliable indicator of the substantive importance of a license provision than an appraisal of the provision's functional role in the license. Experience teaches that parties frequently agree upon some of the most important terms of contracts without a lot of bickering or negotiation; and fairness dictates that Montana Power should not be penalized for agreeing too readily to the proffer of arbitration as a term-fixing mechanism. Moreover, it should be remembered that the published records of the license negotiations are not by any means verbatim transcripts; rather, they are summaries prepared for the use of the Government in its capacity as potential negotiator of similar licenses in the future. Thus, relying upon these records is a rather speculative enterprise, particularly when making the kind of implication from silence that the majority is asserting on this point. However, to the extent that the history of negotiations may be useful to elucidate the present inquiry, I think it points as strongly to the conclusion that the arbitration

clause was considered substantively important and indefeasible.

As the majority points out, the parties to this license, particularly the Government, approached the task of negotiation and drafting with acute awareness that their acts would have great precedential significance; the Scattergood Report states that "it would seem unusually appropriate that special care be taken to develop the factors for regulation under the Federal water power act . . . and for the preparation of a model lease." (J.A. 137.) This care by the parties extended to the task of making sure that the precise instances and scope of future governmental regulation would be specified in the license, in accord with the usages of the 1920 Act. This was done with many sections of the license, both in the negotiations (*see* S. Doc. No. 153, 71st Cong., 2d Sess. 7-9 (1930)) and in the license itself (*see* J.A. 237-258); yet, provision for possible government regulation is notably absent from the readjustment section contained in the license. Moreover, as noted above, the arbitration clause was allowed to become part of Montana Power's license only after the company had rejected the government's proposal to have rentals readjusted "upon the facts as found by the commission." (J.A. 203). Finally, when the license was renegotiated shortly after the passage of the 1935 amendments, the parties themselves provided a practical construction of the license which showed that they believed the arbitration clause to be important enough to remain fully effective. During these renegotiations, the Tribes and the Commission were in a very advantageous bargaining position—and Montana Power was in a very poor one—by virtue of the company's default on its construction obligations; however, the parties included language in the amended license which reflects their belief that the arbitration clause remained in full effect. In the Schedule of Annual Charges contained in Amendment No. 2, the parties stipulated that the rental for the year 1954 would be $205,000, and that "[t]hereafter, *until adjustment of the annual charges payable hereunder shall have been ef-*

fected pursuant to the provisions of paragraph (D) of this Article 30 [the arbitration clause]," the annual rental amount would be $175,000. (J.A. 271; emphasis added.)

Against this background, I find the majority's analysis of the negotiations extremely artificial. The majority concedes—as it must—that there was initially a period of hard bargaining over the price term of the lease. When arbitration entered the picture, however, these negotiations apparently underwent some strange variety of legal mitosis: suddenly, the first twenty-year period of the price term's effectiveness became "bargained for," while the remaining thirty years of the price term became, not "bargained for" but rather an "open-end agreement" or an "on-going agreement"—phrases which apparently have no legal significance, and scant relationship to what I perceive as the thrust of the negotiations. Suffice it to say that, in contrast the relatively simple and expeditious processes of arbitration, this readjustment proceeding certainly has proved to be "open-ended"; there is not even an end to litigation in sight. Other problems remain in the majority opinion, but none seems substantial enough to warrant extending these already lengthy opinions any further, or delaying their issuance any longer. I would require that this controversy be submitted to arbitration forthwith.

MacKinnon, *Circuit Judge, with whom Circuit Judge* McGowan *joins* dissenting: I concur in Judge Tamm's dissenting opinion. The majority opinion relies upon the fact that the 1920 statute, which provided that the readjustment in the annual charge was to be made

> "(e) . . . by the Commission . . . *in a manner to be described in each license* . . . ." (Emphasis added) (41 Stat. 1069)

was amended in 1935 to state:

> "(e) . . . by the Commission . . . subject to the approval of the Indian tribe . . . *upon notice and opportunity for hearing.*" (Emphasis added) (49 Stat. 843)

From this it concludes that the 1935 amendment operated retroactively to amend the terms and provisions of the license issued to petitioner in 1930 so as to change the manner of readjusting the annual charges that is specifically described in petitioner's license, *i.e.*, in the last analysis, arbitration.

In reaching such conclusion the majority opinion overlooks the opening sentence of section 10 which is introductory to subsection (e) and the other subsections thereof. It provides:

> Sec. 10. All licenses issued under this part shall be on the following conditions: etc. (49 Stat. 842).

The intent of Congress in this clause is clearly to prescribe the conditions upon which licenses "shall be" issued, not to amend licenses already issued. If Congress had intended to amend existing licenses they would have said "heretofore or hereafter issued." It is also important to note that the prefatory clause of section 10 was part of the original 1920 Act and so the congressional intent manifest therein was for a completely prospective application. The re-enactment of the same language would not change the original intent. And when this introductory clause of section 10 is read in conjunction with section 28 which provides that ". . . no alteration, amendment . . . shall *affect* any license theretofore issued under the provisions of this act, or the rights of licensees thereunder" (emphasis added) (41 Stat. 1077; 49 Stat. 847), it seems abundantly clear that Congress in the 1935 amendment only intended to affect licenses issued thereafter. This interpretation is buttressed by the well-established rule that a retrospective application of legislation is not to be implied.[1]

---

[1] "[A] retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"

If there were any doubt about such interpretation it is put at rest by noting that the 1935 amendment providing for notice and opportunity for hearing is not by its terms inconsistent with readjusting the annual charges here involved in the manner prescribed in petitioner's license and doing so upon notice and hearing. It is not necessary to strike down a material provision of petitioner's license in order to give prospective effect to the 1935 Act since it only adds a requirement for notice and hearing. Thus the terms of petitioner's license and a prospective operation of the 1935 amendment can both be applied. Statutes are not to be applied retrospectively unless such legislative purpose is clearly expressed.[2] There is no support in the legislation for the suggestion that the quoted provisions of the 1935 Act were intended to affect existing licenses or to be given a retrospective operation. Such evidence of legislative intention as does appear in section 28 is expressly to the contrary.

Union P. R. Co. v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913).

"In the absence of a clearly expressed legislative intent to the contrary, the court will presume that the law-making power is acting for the future, and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force." *Cameron* v. *United States*, 231 U.S. 710, 720 (1914).

"Where it is claimed that law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past." *White* v. *United States*, 191 U.S. 545, 552 (1903).

[2] Hassett v. Welch, 303 U.S. 303, 314 (1938); Miller v. United States, 294 U.S. 435, 439 (1935); Brewster v. Gage, 280 U.S. 327, 337 (1930).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1969

No. 21,904

THE MONTANA POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, SECRETARY OF INTERIOR, *Intervenors*

No. 21,767

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

THE MONTANA POWER COMPANY, *Intervenor*

Before: BAZELON, *Chief Judge*, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON and MACKINNON, *Circuit Judges*, sitting *en banc*.

Order

These cases came on to be reheard before the Court sitting *en banc* on the jurisdictional issue presented, and were reargued by counsel.

ON CONSIDERATION THEREOF, and the determination by this Court *en banc* that the Federal Power Commission had jurisdiction over the proceeding to readjust charges payable by Montana Power to the Tribes, and that this Court has jurisdiction to consider on the merits the petitions to review the order and decision of the Federal Power Commission, it is

ORDERED by this Court *en banc* that these cases shall be referred to a division of this Court for consideration of the merits, in accordance with the opinion of this Court filed herein this date.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,904

THE MONTANA POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, SECRETARY OF INTERIOR, *Intervenors*

No. 21,767

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

THE MONTANA POWER COMPANY, *Intervenor*

Petitions for Review of Orders of the Federal Power Commission

Decided June 26, 1969

Before BURGER,* TAMM and LEVENTHAL, *Circuit Judges.*

TAMM, *Circuit Judge:* We herein consider, review, reverse and remand certain orders of the Federal Power Commission.

The Commission proceeding below was initiated by petition of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereinafter "Tribes"), seeking readjustment of annual charges or rentals paid by the Montana Power Company (hereinafter "Company" or

---

* Concurrence in this decision was received from Judge Burger prior to May 21, 1969—the date on which his nomination for Chief Justice of the United States was announced.

"Montana Power") pursuant to its license permitting the use and development of certain lands within the tribal reserves in the Company's production, transmission and sale of electric power. It is the decision of the Commission that these annual charges are to be appraised and assessed unilaterally by the Commission pursuant to a 1935 amendment to the Federal Water Power Act.[1] It is the position of the Company that any readjustment must be determined by resort to arbitration as provided in its lease. These two positions conflict and their resolution is necessitated. The Tribes, while agreeing with the Commission's determination of method, disagree with its award as to amount. For reasons hereafter developed, we need not reach that point.

On March 7, 1928,[2] the Commission was given the authority by Congress to issue licenses involving lands within the Flathead reservation. The terms of the license were to be subject to approval by the Secretary of the Interior and rentals thereunder were to be credited to the Tribes. Subsequently, in 1929, after some informal communications, the Secretary of the Interior, the Commission and the Montana Power Company entered into negotiations for a license to construct and operate a power project within the reservation. The parties entered into the negotiations under the controlling statutory authority of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063. That Act provided for the issuance of licenses for a term not to exceed 50 years, and "when licenses are issued involving the use of . . . tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license. . . ." Federal Water Power Act of 1920, § 10(e), 41 Stat. 1069. Thereafter, on May 23, 1930, a li-

---

[1] Federal Power Act, 16 U.S.C. §§ 791 *et seq.* (1964).

[2] Act of March 7, 1928, ch. 137, 45 Stat. 200, 212.

cense for the power project was issued for a term of 50 years to a wholly owned subsidiary of the Montana Power Company. The Commission agreed upon and set a "reasonable" charge and, in compliance with Section 10(e) of the Act, included in Article 30(d) of the license a provision requiring that the annual charges could be readjusted by mutual consent of the parties with approval of the Secretary of the Interior, but that, in the event of disagreement thereon, the rental amount would be submitted to arbitration "in the manner provided in 'The United States Arbitration Act' . . . ."[3]

Thereafter, in 1935, the Federal Water Power Act of 1920 was amended to provide that the authorization of licenses on tribal lands would be subject to approval by the Tribes and any readjustment of the annual charges would be undertaken *by the Commission*.[4] Following this enactment the Company took over from its subsidiary (in a manner not here relevant) and completed the proposed units.[5] In 1939 the first unit became functional.

---

[3] "The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation . . . and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission and the Secretary . . . can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in 'The United States Arbitration Act,' . . . such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." (J.A. 249-50)

[4] 16 U.S.C. § 803(e) (1964).

[5] Originally the license had called for the construction and operation of three power units. That provision was subsequently modified to require only two units. The second unit was operable in 1949. It was not until 1954 that a third unit became operational.

Upon the expiration of twenty years from that date, the Tribes, in 1959, petitioned the Commission for readjustment of the annual charges. The Company thereupon brought suit in the U. S. District Court in Montana to compel arbitration. That court held that a determination of jurisdiction must first be contested before the Commission and then tested on appeal under 16 U.S.C. § 825*l*(b) (1964). In the meantime, however, the Commission had been holding hearings on the Tribes' petition with participation of all concerned parties. On October 4, 1967, the Commission held that it had jurisdiction and that the annual rentals would be increased to $950,000 per year and included the so-called Third Unit in their determination. Both the Company and the Tribes petitioned for rehearing and each petition was finally denied on March 21, 1968. Each, as before noted, petitioned this court for review.

The basic and controlling question in this dispute is simply whether the readjustment of the annual charges is subject to unilateral action by the Commission under the amended statute or whether the language of the original license commands arbitration.

The Commission admits that when Montana Power's license was first issued, Section 10(e) of the Federal Water Power Act of 1920 was controlling. It also agrees that this statute authorized readjustment "in a manner to be described in each license . . . ." It is not disputed that at the time this license was issued that "manner" was to be by mutual consent among the parties or, failing that, submittal of the question to arbitration. The Commission urges, however, that Section 10(e) of that Act was later amended by the Federal Power Act in 1935 to accord uniformity in all readjustment procedures in that the annual charges would thereafter be readjusted "by the Commission" after notice and hearing, 16 U.S.C. § 803(e) (1964). It argues that this language was merely corrective of certain problems existing in the earlier Act and that Congress was empowered to vest the Commission with "broad new jurisdiction" over

electric utilities even to the extent of modifying "conflicting procedures specified in existing licenses." (Brief for Commission at 9.)

The Commission does admit, however, both in its brief before this court (p. 10) and in its discussion of *Annual Charges Prescribed for Licenses Under the Federal Power Act*, 31 F.P.C. 1555 (1964), the inapplicability of the 1935 Act to the substantive rights of a licensee in a license issued under the earlier Act. It argues that while the substantive rights became indefeasibly vested by virtue of Section 28 of the Federal Water Power Act, procedural standards were not ever-fixed marks but were fluid and subject to change by future Congresses provided the safeguard of "fairness" was not controverted in the process.

In support of the proposition that procedural rights are variable, the Commission relies on a third circuit case for the concept that a "licensee had no vested right to have its investment determined by one procedure rather than by another . . . ." *Pennsylvania Power and Light Co.* v. *FPC*, 139 F.2d 445, 453 (3rd Cir. 1943). In that case the court, in passing upon the authority of the Commission to determine "net investment" for the purposes of recapture by the United States after a term of the license had expired, permitted the Commission to require the company to record certain sums on its books as "earned surplus" rather than "projected accounts." The Commission's power to require such an accounting was absent from the 1920 Act (in effect at issuance of the license) but was found in the Federal Power Act of 1935. "Accordingly the change of procedure which the 1935 amendment brought about did not, as applied to the present proceeding, violate the Fifth Amendment." *Ibid.*

To further demonstrate the fluctuant quality of procedural rights, the Commission points to the case of *Safe Harbor Water Power Corp.* v. *FPC*, 179 F.2d 179 (3rd Cir. 1949), *cert. denied*, 339 U.S. 957 (1950), for Congressional

authority to change. There the Commission was seeking to regulate "service rates" under Section 20 of the Act. Section 20 gave the Commission the authority, in certain cases, to regulate such activity, but in all other cases regulation was left to the states. Section 20 was carried forward, unamended, into the provisions of the 1935 Act. However, Section 206 of the new Act authorized the Commission to regulate service rates of companies transmitting power at wholesale in interstate commerce. The first attempt by the Commission under Section 20 was struck down by the court as being contrary to the authority left in the states. *See Safe Harbor Water Power Corp.* v. *FPC*, 124 F.2d 800 (3rd Cir. 1941), *cert. denied* 316 U.S. 663 (1942). After remand the Commission again sought to regulate these rates. This time, however, it proceeded under both Section 20 and Section 206. The court, on review, upheld this approach by reading Section 206 as if the provisions of Section 20 were a part thereof. Thus, the rights of Safe Harbor were "preserved" by meeting the requirements of Section 28. *Safe Harbor Water Power Corp.* v. *FPC, supra.*

These two cases are the authority of the Commission for its interpretation of Section 28 of the 1920 Act, 41 Stat. 1077. However, in neither case did the court outline what those requirements are. Our reading of that provision reveals the expression of the Congressional framers

> [t]hat the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal *shall affect any license theretofore issued* under the provisions of this Act, *or the rights of any licensee thereunder.* (Emphasis supplied.)

It is no distortion of the meaning of this provision to interpret it as prohibiting future Acts from affecting existing licenses or altering any of the rights thereunder. That interpretation, based upon the clear and unambiguous language of the statute, also finds support in the legislative history from which it sprung.

Prior to 1920, the utilization of water as a power source was regulated by provisions of the General Dam Acts.[6] Under these Acts the reservation of right to amend or alter was expressly reserved in clauses which contained no provision for the vesting of rights in the licensees. The right to alter, amend, or repeal was reserved and the United States was to incur no liability to those who would suffer by alteration, amendment or repeal. These clauses, evidencing the position on the part of the Government of *caveat emptor*, dissuaded the power industrialist from sinking risk capital in an investment of, at the most, colorable quality.

A dissatisfied but responsive Congress conducted hearings which singled out the lack of "investment security" as a major stumbling block in the path to proper development of water power. In the Senate Report accompanying S. 1419 (later the Federal Water Power Act) it was noted that the General Dam Act "provides for and authorizes conditions upon which the permit may be granted that render the terms of the investment so uncertain and . . . so defeasible that those having capital can not safely and will not make investments under them." S. Rep. No. 179, 65th Cong., 2nd Sess. 3 (1917). One can therefore conclude that the provisions of the 1920 Act were designed to accord protection to the prospective investor as a means of securing capital in that they prohibited future Congresses from impairing rights vested thereunder. As characterized by a proponent of the new bill, this approach was to be a "method by which the water powers of the country . . . can be developed by public or private agencies *under conditions which will give the necessary security to the capital invested* and at the same time protect . . . public interest." (Emphasis supplied.) H.R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

---

[6] Act of June 21, 1906, ch. 3508, 34 Stat. 386; Act of June 23, 1910, ch. 360, 36 Stat. 593.

In addition, our reading of the amended Act of 1935 discloses no apparent intention on the part of Congress to change, in any way, the rights of licensees under prior existing licenses. The clear language of the amendment is completely prospective in its implication. Section 6 of the Federal Power Act, 16 U.S.C. § 799 (1964), requires that "[l]icenses under . . . this title *shall be issued* for a period not exceeding fifty years." (Emphasis supplied.) Section 10 of that Act, 16 U.S.C. § 803 (1964), states that "licenses issued under . . . this title *shall be* on the following conditions . . . (e) . . . *when licenses are issued* involving . . . lands embraced within Indian reservations the Commission *shall . . . fix* a reasonable annual charge . . . and such charges may . . . be readjusted by the Commission . . . upon notice and opportunity for hearing." (Emphasis supplied.) This emphasized language seems to dilute the proposition that the application of the 1935 amendments was to relate back and become dispositive in their application to existing licenses.

That the amendments were intended by the drafters of the Act to be prospective is also supported by the language in the House Report on the Public Utility Act of 1935. In clarifying the purpose of the amendments, specifically Section 10 of the Act, the Report noted that this "section (206) contains several *minor* and clarifying amendments to section 10 of the act, which deals with the conditions upon which licenses *are to be issued.*" (Emphasis supplied.)[7] "Are to be issued," "shall be issued," "when licenses are issued," "shall be," and "shall fix" are phrases expressing an unambiguous intent to command future conduct. Had Congress intended to retroactively affect existing licenses it would have employed phrases such as "were," "existing licenses," "have been issued," and "prior," all of which are conspicuously absent from the amendment and the Congressional Reports.

---

[7] H.R. Rep. No. 1318, 74th Cong., 1st Sess. 24 (1935).

In the Senate Report, the Interstate Commerce Committee characterized the amendment of Section 10(e) as containing "several *minor*" changes relative to charges payable by the licensee. One of these "minor" changes was the "explicit . . . authority of the Commission to adjust . . . all charges imposed under the act." S. Rep. No. 621, 74th Cong., 1st Sess. 45 (1935). That characterization as "minor" of such a sweeping change in authority of the Commission over existing licenses is a master of understatement if such a change was contemplated or accomplished. In any event, we need not finally decide whether the third circuit was correct in its interpretation of the Acts,[8] for we do decide that the right to arbitration, in this case, was a substantive right, embodied in the contract, bargained for and bought by the Commission in its effort to secure a licensee for this project. As such the Commission will be bound by the terms heretofore agreed upon.

We reach this holding after a close analysis of the initial negotiations surrounding the terms of the contract. These parties gathered about the bargaining table with certain objectives to be obtained and certain concessions to be made. Cost studies had been made and the investment of all concerned had been delineated, article by article. They then came to the question of annual charges. Several alternative proposals were made by the parties. The Commission, the Army Engineers and the Indian Bureau all made alternative proposals running from January 2, 1930, to April 1, 1930, in all "[f]our months of negotiations were consumed in discussing those various plans . . . and [they] were never able to reach an agreement. Several deadlocks

---

[8] *See* Ashwander v. TVA, 297 U.S. 288, 348 (1936) (concurring opinion of Justice Brandeis), which emphasizes the Court's traditional attitude of avoiding constitutional questions when a "construction of the statute is fairly possible by which the" constitutional thicket may be circumvented. We adhere to this tradition in our construction of the 1935 amendment as being prospective in its application to this license.

actually developed with the breaking off of negotiations. Finally efforts on these lines were abandoned and a new approach was entered upon. . . ." (J.A. 183-84). (Significantly, the Commission's proposal, which included a provision giving it somewhat the same jurisdiction over readjustments as it now asserts, was *not* adopted.) However, the "new approach" which was adopted was Article 30 of the license as finally issued. These negotiations mirrored concern on the part of all the parties as to how to achieve reasonable charges or rentals in a license which would span half a century. The problems of stretch and shrinkage of the dollar over that period gave rise to the system of annual change in the rental with readjustment at the end of twenty years and every ten years thereafter. The dollar amount was, therefore, a most important consideration. Of equal importance was, at the end of twenty years and subsequent terms of ten years thereafter, who would, in the event of disagreement among the parties, have the final say on readjustment amount? The Secretary's proposal, Article 30(d), was agreed upon as the answer of *who*. That answer was an arbitrator. It was then, and only then, that the Company consented to become the licensee. Secure in the amount of risk, the term of the license, and the manner of readjustment, it accepted the Commission's offer of a license and its rights, thereunder, became fixed.

Further, in analyzing the arbitration rights in this case, one must realize that this is not an instance of whether a court or an arbitration board would decide a dispute but whether an arbitration board or one of the parties would be the final mediator of disagreements among the parties. A central thrust of the dissent is that when the Commission was reconstituted so as to become an "impartial adjudicatory tribunal," that eliminated the need for an arbitrator. This seems to overlook the very pertinent fact that *after* Section 1 of the Federal Water Power Act was amended to eliminate the Interior Secretary as a Commission member, licenses were still issued containing arbitration clauses.

Can it be said, then, that Congress intended the 1935 amendment to prohibit resort to arbitration? This position also ignores the substantial value that is placed upon arbitration as a means of settling disputes among parties. This is and has been a method of settling disputes since the recomposition of the Commission. *See* Record at 1651-59, "Agreement between Portland General Electric Company and Warm Springs Indians."

In this case the provisions for remedy; namely, arbitration, as opposed to other methods of assessment, was so tied up with the substantive contract considerations by the parties that it became a part thereof. This we believe the Company foresaw; the inherent disadvantages of a unilateral decision by one of the parties was inimical to the spirit of negotiation. The Company therefore sought to establish a requirement of arbitration as the "manner" and remedy in arriving at future assessments. We agree that there are distinctions (albeit unclear) between substance changes and remedy changes, *see Home Building and Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934). However, "[n]ot even changes of the remedy may be pressed so far as to cut down the security of a (contract). . . ." *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935); and while the Supreme Court's decisions "have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity [from] change,"[9] so also has it never permitted change in a law to burden a party who foresaw its disadvantages, if changed, and contracted in order to avoid them.

"The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in the ultimate result." *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 (1956). Similarly, a change from an arbitration panel

---

[9] City of El Paso v. Simmons, 379 U.S. 497, 515 (1965).

to a panel made up of members of one of the parties may also work to produce a "radical difference" in the final outcome of the proceedings. This is especially so where the latter alternative was proposed, contemplated, and expressly disregarded as an unrealistic approach to the settlement of disputes. On this record we cannot permit an amendment, unclear as to its retrospective application, to work to substantially affect the rights of a party in its contract where those rights evidenced a meeting of the minds of the participants after lengthy negotiations directed at securing those same rights.

The Tribes and the Secretary of the Interior both contend, in the alternative, that the Company may not now resort to arbitration because the license, in its final form, reflected the image of the 1935 amendments. The original license, issued to Montana Power's subsidiary in 1930, contained a provision (Article 6) for construction and operation of three generators within three years of May 23, 1931. (J.A. 239.) An amendment to that provision was effected in 1932 by an extension of time of completion two additional years. Thereafter, the Company sought additional time to complete construction but was refused and the license was referred to the Attorney General for possible revocation. On July 17, 1936, the Company received a further extension of time to May 23, 1939, under a second amendment to Article 6 (J.A. 262). That amendment also contained provisions involving reapportionment in the annual charges then due and owing by the licensee. The Tribes argue that the Company is effectively estopped from denying the applicability of Section 10(e) of the Federal Power Act because of its 1936 reliance on that same provision. In 1936 the Company had dealt directly with the Tribes in negotiating the extension rather than the Secretary of the Interior as they had under the earlier Act. However, to urge estoppel is to misconstrue the relevant events surrounding the 1936 negotiations. Under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, the

Tribes had become organized as a unit. As such, the Secretary, in 1936, refused to approve a further extension of the lease until and unless the Tribes agreed to that provision first. On May 13, 1936, the Secretary recommended approval of the amendment (J.A. 260-261). Thereafter, the Tribes consented and the amendment, as before noted, was finally effected.

As we read the record in this case, the Company did not seek shelter under the provisions of the Federal Power Act. Those provisions were unavoidable in view of the Indian Reorganization Act and the refusal of the Secretary to act independent of the Tribes. In addition, implied waiver of their rights under the 1920 Act cannot be read into the action of the Company merely because they sought to conform to the 1935 Act with respect to obtaining an extension of time.

The other alternative argument, advanced principally by the Secretary, is that Montana Power's acceptance of the 1936 amendment to its license expressly indicated its willingness to be governed by the provisions of "the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), *as amended* . . ." (emphasis supplied). (J.A. 274.) However, that same instrument contained the proviso that "the license issued to the Licensee . . . is hereby amended as follows upon the *express* condition, however, *that such amendment shall not operate to alter or amend said license in any other respect than as herein specified, and shall not in any way constitute a waiver of any other part, provision, or condition of said license.*" (Emphasis supplied.) (J.A. 263). Again, we cannot imply from the instrument, as written, any intention by the Company to waive its rights under the earlier Act except as expressly outlined in the document. To the contrary, we find express reservation of those rights.

Absent any explicit statutory intent to the contrary and absent waiver on the part of the Company, we hold the

arbitration clause binding. This finding precludes further inquiry into the many problems of this case which, in all likelihood, may be worked out before the master in arbitration. Accordingly, we reverse the decisions and orders of the Commission and remand the case to that body to dismiss the action for want of jurisdiction. Thereafter, the parties, in accordance with their license, may submit the dispute to arbitration.

REVERSED AND REMANDED.

LEVENTHAL, *Circuit Judge*, dissenting: I respectfully dissent from the opinion of my brethren. In my view the Federal Power Commission has jurisdiction, under § 10(e) of the Federal Water Power Act, as amended, to fix readjusted annual charges payable by Montana Power Co. to the Tribes (Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), for its use of tribal lands in connection with its operation of the Kerr hydroelectric project (Project No. 5) pursuant to the license authorization obtained from the Commission.

The Kerr project includes a concrete arch dam and a power house located at the southern side of Flathead Lake on land owned by the Tribes. The original license dated May 23, 1930, was issued to Rocky Mountain Power Co., a wholly-owned subsidiary of Montana Power. It established a 50-year term and authorized construction of three generating units aggregating not less than 150,000 hp, to be completed within three years. It specified annual charges as compensation for the use of tribal lands and further provided, in article 30(D), for readjustment (1) by mutual agreement between the Commission and the licensee, with the approval of the Secretary of the Interior, or (2) failing that, by arbitration in the manner provided for in the United States Arbitration Act.

Article 30(D) further set forth as the governing criterion —"such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14

of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."

The license was issued under the Federal Water Power Act of 1920,[1] which, amended, became Title I of the Federal Power Act in 1935.[2] The Act authorizes the Commission to issue licenses for the purpose, *inter alia*, of constructing dams, power houses, or other project works, for the utilization of power from bodies of water over which Congress has jurisdiction (§ 4). Section 6 of the Act provides that licenses shall be issued for a period not exceeding 50 years, and each license shall be conditioned on acceptance by the licensee of all terms and conditions of the Act and such further conditions as the Commission shall prescribe in conformity with the Act.

Our particular attention goes to section 10 which provides that all licenses shall be on certain prescribed conditions. Subsection (d) sets forth the condition requiring the licensee to establish amortization reserves from excess profits earned after the project has been in operation for 20 years. Other provisions give the Commission power to apply these reserves to reduce net investment in the project, and also (see § 14) give the Government the right to take over the project on expiration of the license on payment of net investment. *See Niagara Mohawk Power Corp.* v. *FPC*, 126 U.S.App.D.C. 376, 379 F.2d 153 (1967).

Section 10(e) contains certain general provisions—that the licensee shall pay the United States reasonable annual charges, as fixed by the Commission, as reimbursement for the cost of administration and to recompense it for the use of its lands or other property, that charges for the expropriation of excessive profits may be adjusted from time to time as conditions may require.

---

[1] Act of June 10, 1920, 41 Stat. 1063.

[2] 16 U.S.C. § 791a *et seq.* (1964), *as amended* (Supp. IV, 1969).

The foregoing provisions are the same now, in respects here material, as they were in 1920. There is a difference, however, for the proviso of § 10(e), which refers to the special case "when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations." As enacted in 1920, this proviso continued—"the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license." As amended in 1935 the statutory provision sets forth that:

> the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands . . . fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing.

It is this 1935 provision for readjustment of annual charges that was invoked by the petition of the Tribes filed with the Commission in 1959, and by the Commission in its order of readjustment of charges that is brought here on petition to renew. Montana Power claims the 1935 readjustment provision is inapplicable because, when the original license was issued in 1930, the statute provided only for readjustment of charges "in a manner to be described in each license."

Montana Power claims that since the 1930 license provided for readjustment only by agreement or arbitration, the Commission is without jurisdiction to readjust charges.

It says this conclusion is required in order to avoid a constitutional and statutory thicket. And it relies particularly on § 28 of the Act (41 Stat. 1077, 16 U.S.C. § 822 (1964)) which has since 1920 provided:

> The right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

The 1920 Act marked a change in national policy, a Congressional determination to go beyond merely forbidding obstruction to navigation and to achieve instead a comprehensive development of national resources. But it reflected deficiencies in administration and implementation. And so changes were made in 1930 and 1935. *Niagara Mohawk Power Co.* v. *FPC*, *supra*, 126 U.S.App.D.C. at 378, 379 F.2d at 155. The 1930 change was one whereby the Commission was reorganized and became an independent regulatory commission, instead of a committee of cabinet officers—the Secretaries of War, Agriculture and Interior.[3] As to the 1935 amendments, the pertinent committee report[4] discussing changes in § 10(e) states:

> The amendment also makes explicit the authority of the Commission to adjust from time to time all charges imposed under the act. In the proviso that charges for licenses involving the use of government dams shall be adjusted at the end of twenty years, there is introduced for the purpose of clarification the provision that such readjustment shall be made "by the Commission" . . . .

Licenses involving use of tribal lands are in the same proviso, of course, as licenses involving the use of government structures.

In my opinion the intent of Congress is furthered, and constitutional guarantees are safeguarded, by a general

---

[3] Act of June 23, 1930, 46 Stat. 797.

[4] S. Rep. No. 621, 74th Cong., 1st Sess. (1935), at 45.

view of the statutory scheme as preserving to a licensee like Montana the continuance without alteration of all substantive provisions of its license—including in this case, *e.g.*, not only the specific annual charges, but also the criterion set forth in the license for the determination of readjusted charges after twenty years. But I do not think either § 28 or the Constitution operates to make the particular remedy or machinery provided in the 1930 license to carry out this standard immune against modification and improvement.

This view of both the statutory scheme and constitutional requirements is supported by *Pennsylvania Power & Light Co.* v. *FPC*, 139 F.2d 445 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 (1944). There the company contended "that the Federal Water Power Act, under which the license was granted, did not entrust the Commission with control of the licensee's capital accounts, but merely of the project accounts and that even as to project accounts final determination of project cost or net investment was entrusted by the original act to the district court rather than to the Commission." The court disagreed and in its opinion, written by Judge Maris, said (at 453):

> "We see no merit in these contentions. * * * [T]he licensee had no vested right to have its investment determined by one procedure rather than by another at least so long as it was accorded a right to be heard and an ultimate judicial review. Accordingly the change of procedure which the 1935 amendment brought about did not, as applied to the present proceeding, violate the Fifth Amendment. Crane v. Hahlo, 1922, 258 U.S. 142."

As for the contention presented by the company[5] that § 28 precluded the use of the new proviso specified in the 1935 act, this point was obviously governed by the same considerations as the constitutional issue and hence was not separately discussed by the court.

---

[5] Brief for Petitioner before C.A. 3d, No. 8107, p. 41.

Crane v. *Hahlo*, cited by Judge Maris, reflects the state of jurisprudence at about the time the 1920 law was passed. The Supreme Court there dealt with the right of a landowner to recover damages resulting to his property from a change in the grade of the street. While his claim for damages was pending before the board of assessors the law was amended to remove general review by a court and to make the board's award final as to amount, reviewable only for lack of jurisdiction, fraud, or wilful misconduct of members of the board. The Supreme Court found no constitutional inhibition, saying, in a unanimous opinion delivered by Justice Clarke (258 U.S. at 147-48, citations omitted):

> "No one has a vested right in any given mode of procedure and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change. . . . [The amendment] afforded ample protection for the fundamental rights of the plaintiff in error, and the taking away of the right to have examined mere claims of honest error in the conduct of the proceeding by the Board did not invade any federal constitutional right. Even courts have been known to make rulings thought by counsel to be erroneous."

As for the complaint that the board was composed of three city officials appointed by the mayor, the Court approved the opinion below which noted that the city's payment of any claim would be covered by an assessment, and continued: "Officials acting really as an auditing board are not condemned because they have been selected by the municipality or other division against which the claim is made." *Crane* was cited with approval in *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, 284 U.S. 151 (1931), which considered a law that "substitutes a determination by arbitration for trial in courts of the single issue of the amount of loss suffered under a fire insurance policy" (p. 158). The Court, per Justice Stone, held that "the requirements of the Fourteenth Amendment, so far as now invoked, are

satisfied if the substitute remedy is substantial and efficient." *See Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922).

These precedents show that when all that is involved is a change in tribunal, when a determination by a court is replaced by a final determination subject only to limited court review, of a board of officials (*Crane* and *Pennsylvania Power & Light*) or arbitrators (*Glidden*), the change in remedy does not partake of impairment of "vested rights." These precedents undercut any claim that the legislature's substitution of arbitration for a commission, or vice versa, is more than a change of remedy (assuming limited judicial review) and rises to the level of alteration of substantive rights.

The same kind of consideration is pertinent to determination of the sound construction given the 1935 act, as establishing uniformity of decisional responsibility, so long as there is no alteration of accrued substantive rights. *Pennsylvania Power & Light Co.* v. *FPC*, *supra*. This view is also supported by *Safe Harbor Water Power Corp.* v. *FPC*, 179 F.2d 179 (3d Cir. 1949), *cert. denied*, 339 U.S. 957 (1950). The legislative history already cited supports the conclusion that the 1935 act intended the Commission to have the responsibility for fixing annual charges, in all licenses thereafter issued, and to have jurisdiction over any readjustment of charges made subsequent to the 1935 amendment.

The discussion of precedents should also take note of *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N.Y. 261, 130 N.E. 288 (1921), holding that the state's new arbitration law could be applied to contracts entered into before its enactment. Judge Cardozo's opinion said (230 N.Y. at 262, 130 N.E. at 290):

> "* * * Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already

made. It vindicated by a new method the obligation then existing."

Montana Power points to *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), where the Supreme Court held that in diversity actions federal district courts must apply the law concerning availability of the arbitration remedy that would have applied if the suit action had been brought in the state court. The Court said, through Justice Douglas (350 U.S. at 202-03):

> "The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is, as we said in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108, in substance 'only another court of the State.' The federal court therefore may not 'substantially affect the enforcement of the right as given by the State.' *Id.*, 109. If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action."

The limited significance of *Polygraphic* for present purposes is illuminated by the case it cites, *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945). The Court there held that a federal court could not maintain a diversity action that would have been barred by the statute of limitations if brought in a state court. Justice Frankfurter pointed out that the issue is not resolved by inquiring whether a statute of limitations "is deemed a matter of 'procedure' in some

sense," but rather whether for purposes of the policy on distribution of power between state and federal courts, "statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation." (326 U.S. at 109.) The need to focus on context is highlighted by Justice Frankfurter's discussion on the preceding page (326 U.S. at 108):

> "Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. See *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 409. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to *ex post facto* legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws."

Assuming that the issue before us turns on such concepts as determining what are "substantive" rights as contrasted with "procedural remedies," these words may have different meanings in different contexts. *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918). *Polygraphic* was in no wise intended by the Court to bear on the "very different problems" presented by constitutional claims like ex post facto legislation or impairment of contract obligations, or the related issue of statutory intent involved in determining whether a new remedy applies to outstanding matters. For that purpose

the pre-*Polygraphic* precedents, and their analysis discussed above, stand unshaken.

Montana Power makes an alternative contention that in this particular license "the arbitration provision is a substantive provision, bargained for as a major element in the agreement, and hence a vested right" which Congress could not and did not take away. The materials cited to us reveal that there was considerable study and negotiation over the amount of annual rentals that would be fair to the Tribes, and whether they should be on a flat basis or depend on actual use of facilities. A flat schedule was finally agreed to. But there is nothing to indicate a deep concern over the method of readjustment. Whoever proposed readjustment be decided through arbitration in the event of inability to agree, it seems to have won general acceptance, no doubt because of the potentially conflicting responsibilities of the Secretary of the Interior, who was then both a member of the Commission and a trustee for the Indians. But after the license was issued the Commission was reorganized from a Cabinet committee to a five-member independent commission. When Congress placed readjustment responsibility in the Commission in 1935, the arbitration provision was no longer necessary in order to provide a disinterested agency for the readjustment function. *Compare Crane* v. *Hahlo*, *supra*.

Indeed consideration of the particular situation of Montana Power serves, in my opinion, to strengthen rather than weaken the assertion of readjustment jurisdiction by the Commission.

On February 16, 1935, Rocky Mountain, having failed to complete construction within the period provided in the license, applied for an extension of time to May 1938, to complete construction. This motion was denied by the Commission on April 1, 1935. It was not until July 17, 1936, that an amendment to the 1930 license was issued by the Commission authorizing construction. The license as

amended called for two generating units (instead of three), and for a capacity of 154,000 hp (instead of a minimum of 150,000 hp). Whereas the original license called for rental charges no higher than $175,000, the amended license called for rents rising to $205,000.

These matters were all negotiated directly with the Tribe, which had been given powers of self-government pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984. On June 30, 1936, Rocky Mountain accepted all the terms and conditions of the instrument "and of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended." The parties seem to have focused solely on initial charges, but it is hard to reconcile this 1936 activity, resulting in substantial amendments of the license, thus avoiding the possibility that the license might be terminated for default, with the contention that the 1935 provision could not fairly upset what was previously agreed so as to become applicable to future readjustment.

But there is more to be said about post-1920 developments. Montana Power, which had succeeded to the license in 1938, completed the second unit in 1949. It completed and began operating a third unit in 1954, albeit it had not obtained requisite licensing authorization. The Commission amended the Kerr license nunc pro tunc in 1961, and required annual payments of $63,375 for additional use of Tribal lands from 1954. This court affirmed the Commission's action. *Montana Power Co.* v. *FPC*, 112 U.S.App. D.C. 7, 298 F.2d 335 (1962). This court stated (*see* 112 U.S.App.D.C. at 11, 298 F.2d at 339), that though no new tribal lands were involved there was an additional use provided by an additional authority, which "although called an amendment, was a new and original license for the third unit." "The Commission does not necessarily license all the project works of a given project at one time."

The new license for the third unit is an illuminating aspect of this case, in my mind. Montana Power would have to

agree that it has no vested right of arbitration which could preclude Commission jurisdiction to engage in readjustment of rental charges as to the third unit. But it seems to me manifest good sense that the same tribunal should have readjustment jurisdiction for the different units of this Kerr project—putting aside for the moment the differences between the parties as to when this readjustment authority may be exercised so far as the third unit is concerned. This also bears on legislative intent. Can it be supposed that the 1935 legislature, reconstructing as best we can what it would have said about the problem if its attention had been expressly directed to it, would rule that arbitration would govern as to units already authorized but the Commission would exercise readjustment jurisdiction as to units thereafter authorized? This seems patently unlikely, quite apart from the point already noted that the construction of the two units eventually constructed was not authorized until 1936.

This leads me into an aspect of this case in which I take issue with the position of the Commission, the Secretary and the Tribes. They seem to feel that § 10(e) as amended in 1935 requires the Commission to fix readjustment of charges. But § 10(e) only says that the charges "may be readjusted" by the Commission after twenty years. I think the Congress has given the Commission the jurisdiction and responsibility. But I think the Commission would have discretion to abstain from taking on this assignment, and conducting the requisite hearing, if the parties agreed among themselves to the readjusted rentals. And even if they did not come to an agreement as to the amount of the readjusted rentals, the Commission might respect their agreement to submit the matter to arbitration. There is scope for settlement agreements, subject to approval by the Commission, even in the setting of rates for the public. *City of Chicago* v. *FPC*, 128 U.S.App.D.C. 107, 116-19, 385 F.2d 629, 638-41 (1967). Here what is involved is allocation of costs between parties. Although the subject-matter is quite dif-

ferent it may not be entirely irrelevant to note the abstention doctrine pursuant to which the National Labor Relations Board refrains from exercising its statutory jurisdiction in certain cases where the problem can be disposed of by arbitration between the parties. *See Office and Professional Employees Int'l Union* [*BLFE*] v. *NLRB*, — U.S. App.D.C. —, — F.2d — (March 19, 1969).

One of the record exhibits reveals that the license issued by the Commission to the Portland General Electric Company for a project involving the use of lands of the Warm Springs Indians provided for readjustment of Indian rentals by arbitration, pursuant to the agreement of the parties made in 1955 and amended in 1961. 26 F.P.C. 192. I think the Commission may satisfy its statutory responsibility in some cases by abstention, and in other cases by exercise of its jurisdiction. What would make the case of the Kerr project particularly appropriate for exercise of jurisdiction rather than abstention is the absence of provision for arbitration of readjustment of the additional rental charges inserted for the third unit.

Moreover, the doctrine of abstention for arbitration need not be a total abstention. There is room for flexibility in evolution of relationship between administrative disposition and arbitration, a flexibility that is part of the genius of administrative law and procedure. It is familiar doctrine that a court may stay a proceeding until an administrative agency has considered either all or an important part of the controversy. Similarly an agency may stay its proceeding while the parties negotiate toward agreement, as in the familiar settlement agreement, or while the arbitrators they have already agreed to appoint grapple with the matter. The arbitrator's "award" would not be completely self-executing, because the commission would retain ultimate jurisdiction. But the award would have the same legal significance as an agreement between the parties. *Compare Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*,

128 U.S.App.D.C. 59, 74, 385 F.2d 581, 596 (1967), *cert. denied*, 390 U.S. 923 (1968). This would at the very least be a strong "advisory effect, and in practical terms it might permit the commission to grapple much better with its prodigious work load.

This kind of flexibility, like the commission's use of negotiated settlements, takes account of the significant difference between these two approaches in the settlement of controversies. Disposition by an administrative agency, like disposition by a court, depends on reasoned disposition, on application of general rules and standards to the facts of a particular matter. Arbitration may proceed by that judicial type of disposition, but it may also partake of the kind of consensual disposition which prevails among businessmen, or in the relations between business and labor, and for that matter even in the halls of the legislature. Arbitrators do not have to give reasons and in some types of matters that may be an advantage. It is commonplace that parties may be able to agree on a particular result more readily than they can agree on a statement of the general approach that harmonizes with the particular result. "The parties may be disposed to avoid the expense and distractions of litigation if the various rates reached in a settlement do not constitute a binding admission or ruling on principle. *City of Chicago* v. *FPC*, *supra*, 128 U.S.App.D.C. at 119, 385 F.2d at 637.

Justice and law have room for both approaches—for the reasoned application of rules to instances, and for the disposition without statement of reasons, either by virtue of agreed settlement or by virtue of agreed arbitration.

I have already noted that the technique of arbitration, however useful in appropriate instances, might have serious drawbacks for the controversy before us because of the third unit problem. But there are other problems that trouble me. The case before us involves a license issued by the Commission, and agreed to by Montana Power. Is the Commission to become involved before the district court as

a party agreeing to arbitration? Is the matter to be re-constructed as an agreement to arbitrate between the company and the Secretary because the company accepted and the Secretary approved (in more than one capacity) the terms of the license? Is it the Tribes or the Secretary who conducts the arbitration? I dare say these matters can be handled with the application of ingenuity and problem-solving spirit, especially since the landowner is anxious for the adjustment. But they are a troublesome factor in the case that undercuts the apparent simplicity of Montana's presentation.

As I take leave of this case, relieved of the necessity of coping with loose ends[6] and the issues on the merits, I suppose my main concern is dismay at the necessity of further prolongation of an already long and bitter controversy. I am confident that my brethren regret this oncoming delay as much as I, but feel that it is an unfortunate residue of sound principle. Perhaps we can take comfort in the possibility that even if the case now goes to arbitration the District Court for Montana could appoint the Federal Power Commission as arbitrator. I have not studied the matter in depth, but offhand I see no reason why this appointment would not be permissible under the Arbitration Act. If it were permissible and were made, it would avoid unnecessary delay in settling this overdue controversy, and would avoid unseemly divergence in readjustment charges as between the different units.

---

[6] Such as the so-called "veto" power asserted by the Secretary of the Interior. The Secretary's brief expressly disavows any authority to overrule a judgment of this court. Commissioner Carver was of the view that the Indian tribes' 1959 petitions for readjustment by the Commission constituted the approval required by the proviso to § 10(e).

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

ANNUAL CHARGES

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

PROJECT NO. 5

THE MONTANA POWER COMPANY

Opinion No. 529

Opinion and Order Readjusting Annual Charges

(Issued October 4, 1967)

Ross, Commissioner:

This matter is before us pursuant to the filing, on May 19, 1959, of a petition by the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) to readjust the annual charges paid by the Montana Power Company (Montana Power) for the use of tribal lands used in the Kerr Hydroelectric Development, Project No. 5, in accordance with Section 10(e) of the Federal Power Act and Article 30(D) of the project license.

Following a hearing, Examiner Ames W. Williams issued his decision finding that Montana Power should increase its annual charges to the Tribes from $238,375 to $850,000 annually. The three parties—Tribes, Montana Power, and the Secretary of Interior (Secretary) and Staff filed exceptions to the Examiner's decision which raise the following issues:

1. Whether the Commission has jurisdiction to establish annual charges under Section 10(e) of the Federal Power Act as opposed to arbitration.

2. The exact date of expiration of the initial twenty-year period of commercial operation of Project No. 5 and

whether the readjusted charge should be made retroactive to this date.

3. Whether the readjustment of charges should include the third unit of the current installation.

4. The determination of the readjusted charge. This includes the consideration of net benefits or profitability or some other method of computation and, after that, a consideration of what share the Tribes should have in such net benefits or profitability.

5. The appropriate interest rate on any increased annual charges.

We hold that: (1) The Commission has jurisdiction under Section 10(e) of the Act to readjust annual charges; (2) the project was available for and began commercial operations on May 20, 1939; (3) the readjusted annual charges should be effective 20 years from May 20, 1939; (4) the readjustment should include the third unit of the current installation; (5) the readjusted annual charge is $950,000 with simple interest at 6 percent.

In large measure, the Examiner reached the same conclusions and we are adopting his decision to the extent consistent with this opinion.

Background

Project No. 5, which has an installed capacity of 168,000 kilowatts, is located on Flathead River and Flathead Lake about five miles downstream from Poulson, in Flathead and Lake Counties, Montana. Flathead Lake serves as the project reservoir.

Pursuant to the Hell Gate Treaty of July 16, 1855, (12 Stat. 975), the Tribes own the lands underlying the southern half of the lake and the lands occupied by the dam and powerhouse.

Kerr Dam is a variable radius concrete arch, 381 feet long and 200 feet high, with a radius of 179 feet at the top. The storage capacity of Flathead Lake between elevations 2883 and 2893 feet is 1,217,000 acre feet. The installation has three generating units, the first and second of which are 77,000 horsepower and were placed in service on May 20, 1939, and May 31, 1949, respectively. The third unit, a 78,000 horsepower turbine, came on the line December 5, 1954.

The Commission issued the original license for the Kerr Project on May 23, 1930, for a term of fifty years pursuant to the Federal Water Power Act (41 Stat. 1063, 16 U.S.C. 791-823).[1] The licensee did not complete construction within the period prescribed by the license. When it applied for an amendment to extend the time, the Secretary opposed the application and the matter was referred to the Attorney General. Section 10(e) was thereafter amended as part of the 1935 amendments to the Federal Water Power Act, and the Tribes were organized. Subsequently, the Secretary consented to the amendment of the license which was granted by the Commission on June 23, 1936.

Section 10(e) of the Federal Power Act, as amended, authorizes the readjustment of annual charges for the use of Indian lands after the development has been available for service for twenty years and thereafter at intervals of not less than ten years. The annual charges as originally fixed by the Commission and supplemented by the Commission's decision involving the installation of the third turbine in 1954 presently amount to $238,375.

The Tribes petitioned for readjustment on May 19, 1959, but no action was taken thereon because a proceeding was

---

[1] A special act of March 7, 1928, 45 Stat. 200, 212-213, authorized the Commission to issue a license for the use of lands within the Flathead Indian Reservation "upon terms satisfactory to the Secretary of Interior."

then pending with respect to the fixing of annual charges for the third unit. That matter was finally determined on January 25, 1962, in the case of *Montana Power Company* v. *F.P.C.*, 298 F.2d 335.

We thereafter set this matter for hearing upon failure of the parties to negotiate a mutually satisfactory readjustment of the annual charges.

Jurisdiction of FPC

Shortly before hearings commenced the Company sought to stay the proceeding and to compel compliance with the arbitration provision of Article 30(D) of the license by filing a petition in the U. S. District Court for the District of Montana, Butte Division. The Court, however, dismissed the action forthwith, stating that the exclusive jurisdiction to determine the issue lies with the Federal Power Commission and the Court of Appeals under Section 313(b) of the Federal Power Act (16 U.S.C. 8251).

In setting the hearing in this case, the Commission recognized as a question of law the contention of the Company that the Commission lacks the jurisdiction to hear the dispute and permitted argument and the presentation of briefs upon this basic issue.

Section 30 (D) of the subject license, which was issued on May 23, 1930, provides:

> The annual *charges* payable under this license may be *readjusted* at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by *mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to*

arbitration in the manner provided for in "The United States Arbitration Act," (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable *purpose for which suitable, including power development.* (Emphasis added.)

This license was issued under the Federal Water Power Act, Section 10(e) of which, in pertinent part, read as follows:

> . . . (W)hen licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license.

The Act of August 26, 1935, amended Section 10(e) in relevant part as follows:

> . . . (W)hen licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, *subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984)*, fix a reasonable annual charge for the use thereof, and such charges may *with like approval* be readjusted by the Commission at the end of twenty years after the *project is available for*

service and at periods of not less than ten years thereafter upon notice and opportunity for hearing . . . (Emphasis added.)

Montana Power contends that Article 30(D) of the License calling for arbitration of readjustment of charges confers a substantive right upon it and asserts that this is confirmed by Section 28 of the Federal Power Act which provides that "no . . . amendment . . . shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder." Hence, Montana Power claims that it is not affected by the changes in Section 10(e) in the 1935 Act which provides that the "Commission shall . . . fix a reasonable annual charge . . . and such charges may . . . be readjusted by the Commission . . ." Rather, it argues, it is governed by the provision of the original Section 10(e) which provided that readjustment of annual charges be made in the manner described in each license.

The Commission must determine whether arbitration controls the method of adjustment, or whether Section 10(e) controls it.

If Section 30(D) of the License confers a substantive right on the Licensee that right is expressly reserved by Section 28 of the Federal Power Act. If, however, the method of determination of annual fees is procedural rather than substantive in nature, then Congress may from time to time describe or change that procedure without abrogating constitutional rights.

The substantive right conferred by Section 30(D) of the license consists of the expression of the criterion for the readjustment of the annual charge, to wit, "upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." But that criterion will govern irrespective of the procedure employed for its application. Thus, it is

apparent that the procedural alteration prescribed by Congress does not work any substantive change. Whatever the procedure employed, the final result must be the establishment of a reasonable annual charge.[2] Certainly it was not unreasonable for Congress to conclude that the application of this substantive standard, one which requires intimate familiarity with the technical operations of hydroelectric developments, could better be applied by a commission with established expertise than by arbitrator who could at best enjoy but ad hoc familiarity with the underlying technical and legal complexities.

Arbitration by reason of its inherent nature is a procedural process, namely: a means, mechanism or device by which differences may be adjusted, reconciled or settled. The 1935 amendment of Section 10(e), by providing a hearing procedure before the Commission, obviously did not predetermine or deprive the Company of a reasonable means of determining a readjustment of annual charges. In addition to allowing the opportunity for a hearing, the 1935 amendment furnished the license with a facility for obtaining judicial review of the resulting determination.

The cases support this conclusion. Particularly in point is *Pennsylvania Power & Light Company* v. *F.P.C.*, 139 F.2d 445 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 (1944), wherein it was contended that Section 14 of the Water Power Act, providing for a determination of net investment by a district court if the Commission and licensee disagreed, was a substantive right and, therefore, unaffected by the 1935 amendment of such sections of the Act which provided for a determination of the issue by the Commission. The court stated, in material part, at page 453:

> The licensee had no vested right to have its investment determined by one procedure rather than another at least so long as it was accorded a right to be heard

[2] 298 F.2d 335, 340 (CADC 1962).

and an ultimate judicial review. Accordingly the change of procedure which the 1935 amendment brought about did not, as applied to the present proceeding, violate the Fifth Amendment.

Also, in *Safe Harbor Water Power Corp.*, 5 FPC 221 (1946), aff'd 179 F.2d 179 (3d Cir. 1949), *cert. denied*, 339 U.S. 957 (1950), a licensee under the Water Power Act contended that any enlargement of Commission jurisdiction by reason of the enactment of Part II of the Federal Power Act was invalid because Section 28 precluded the alteration of a license without the consent of the licensee.[3] The Commission, in deciding the issue, rejected the contention at page 243:

> One other contention advanced by Safe Harbor in regard to jurisdiction should be noticed. Safe Harbor contends that it cannot be regulated under any provisions other than those in Section 20, because it construes its license to be a contract, and argues that the effect of Section 28, which saves outstanding licenses from alteration, together with its license, issued subject to the provisions of the Federal Water Power Act of 1920, is to protect the license from alteration by Congress without Safe Harbor's consent. It does not contend that the rate fixed by this Commission under Section 20 would be any different from that fixed under Part II. Safe Harbor's objection, then, amounts to no more than that Congress is without power to substitute determination by one agency, for that by another. The alteration opposed here is one of procedure, and procedural changes may be effected without consent of the "licensee."

---

[3] Under Section 20 of the Federal Water Power Act the states could regulate the wholesale rates of hydroelectric licensees whereas the FPC was granted exclusive wholesale rate jurisdiction in Part II of the Federal Power Act.

Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1903), involved a change of procedures for enforcement of the rights of the contract after the contract was entered into. The Court there pointed out that the legislature may not withdraw all remedies and thus, in effect, destroy the contract. Nor may it impose new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as was established when the contract was made. The Court held, however, that the legislature may modify or change existing remedies or procedures without impairing the obligation of contract, provided that a substantial and efficacious remedy remains or is given by which means the party can enforce his rights under the contract.

We find that Congress by amending Section 10(e) did nothing more than change a procedure while retaining a substantial and efficacious remedy protecting the rights of the parties insofar as annual charges are concerned. Indeed, Congress materially improved the rights of the parties in the determination of a fair and reasonable charge by the amendment to Section 10(e). The parties now have the right to have an official record of the proceedings. They obtained the right to cross-examination. They obtained the right to rebuttal. They obtained the right to file exceptions. They obtained the right to apply for a rehearing if aggrieved.

When Readjustment of Charges May Be Effected

Section 10(e) of the Federal Water Power Act and Article 30(D) of the Kerr License provide for readjustment of annual charges for the use of Indian lands "at the end of twenty years after the beginning of operations" and "at the end of twenty (20) years after the beginning of operation under the license," respectively. In Section 10(e) of the Federal Power Act, as amended, the phrase

was altered to read "at the end of twenty years after the project is available for service."

In a proceeding to determine the actual legitimate original cost of the project, including the amount of interest during constructon, this Commission by order dated March 30, 1948 (7 FPC 528, 530) determined that interest costs would be deemed to have terminated on August 1, 1938, when Project No. 5 "was placed in commercial operation . . ." The record indicates that the August 1, 1938, date was utilized for a limited accounting purpose relating primarily to the termination of interest charges and that it has no direct bearing upon the commencement of commercial operations.

Commencing on October 2, 1938, 1,103,000 kwh were generated during a three-day period, but that date does not appear to be either the date marking the beginning of commercial operations or when the project became available for service. This generation amounted to only a test run and generation was terminated. During this period, Montana Power experienced trouble with a circuit breaker. Additionally, other technical adjustments were required. No further power was generated until May, 1939 when the project began commercial operations. As noted in the third unit case, "The first of the two units was placed in operation May 20, 1939 . . ." 298 F.2d 335, 336.

There is no convincing evidence indicating that Montana Power failed to commence the operation of this particularly efficient project as soon as it was ready. We therefore find that the project began commercial operations when it was available and that May 20, 1939, is the operative date under Section 10(e). This conclusion finds support in the fact that, in accordance with the schedule of charges, the charge accelerated on June 1, 1939, the first full month after the commencement of operations, from $1,000 to $5,000 a month. Further, the Tribes, apparently relying on the same date as subsequently found by the

Circuit Court, filed their petition for readjustment of annual charges on May 19, 1959, it being the conclusion of twenty years commencing May 20, 1939.

The date when the project began commercial operations and hence when twenty years shall have expired becomes important only if the annual charge is to be readjusted and only if it is to be readjusted effective with the expiration of the first twenty years.

Montana Power asserts that if the annual charge is to be readjusted, it is to become effective beginning with the determination and the readjustment can have no retroactive effect. Montana Power alleges that the Tribes were dilatory in waiting until the very end of the twentieth year before petitioning for readjustment.

We are not persuaded by Montana Power's contentions. Section 10(e) of both the Federal Water Power Act and the Federal Power Act contemplated that annual charges may be readjusted after twenty years. To hold that no readjusted charge could become effective until promulgated after appropriate hearing not only would encourage litigation but would place a premium on delay, dilatory tactics and protraction of that litigation. The purpose of Section 10(e) both of the Federal Water Power Act and the Federal Power Act was to provide that the Indian proprietors of the land would be compensated for use of their lands by reasonable rentals thereon. It would be grossly inequitable to allow a tenant to occupy premises during a dispute over the establishment of a fair and reasonable rental charge if such charge were not effective during the full period of the dispute. The owner is entitled to his proper rental for the period of occupancy although the final determination as to the proper amount may not be reached until long afterward. Indeed, it is not difficult to imagine a situation where the final determination may not be reached until after the premises have been vacated. The logical extension of Montana Power's argument is that

the owner would be entitled to no readjusted rents in that case.

Montana Power's argument that it would be irreparably injured by a retroactive determination is not convincing. Montana Power had available the obvious and normal practice of making adequate provision for possible increased payments by maintaining a reserve account. It chose not to avail itself of this practice but instead used the money in its normal operations. It should not now be excused from making proper payments because of its own failures.

Where, as here, the claim for readjustment is made contemporaneous with the expiration of the statutory period, we conclude that the statute contemplates that any readjustment ultimately determined becomes effective upon the date which marks the completion of the first twenty years after the project is available for service.

Interest

We further conclude that Montana Power should pay interest on the difference between the rent it actually paid and that rent we have found to be fair and reasonable herein. That rate of interest is reasonably and properly six percent simple interest per annum, which rate is in accord with other holdings of this Commission in closely analogous situations, *Wisconsin and Michigan Power Company*, Opinion No. 432, 31 FPC 1445, 1462.

In determining that interest shall be paid at six percent we are aware that in the third unit proceeding (25 FPC at 224) we provided, without explanation, that interest should be paid at the rate of four percent per annum. We are not bound by that decision. Based upon our consideration of the arguments advanced here we find that to perpetuate that unrealistically low interest rate would unjustly enrich Montana Power at the expense of the Tribes. Accordingly, we find that equity requires selection of a rate of interest

which more closely approximates the prevailing commercial rate of return, i.e., 6 percent.

THE THIRD UNIT ISSUE

Whether the rent assessed by reason of the construction of the third unit is to be deemed separate and distinct from the rentals assessed against the first two units constitutes a separate issue. If separate and distinct, the rental for the third unit would remain for twenty years from December 1, 1954, and any readjustment would be limited as of May 20, 1959, to the first two units. The resolution of this issue rests on whether rents are to be applied to a project or to project works. In the third unit case, Montana Power took the position that rents are applicable to a project, that only a single project exists since only a single license has ever been issued for Project No. 5, that rents were fixed at the beginning of such project which could not be readjusted before the expiration of twenty years from that beginning and that the rentals must be deemed to have covered the third unit.

The company now contends that having found a separate and additonal rental due by reason of the third unit, it must be deemed a separate part for the purposes of readjustment.

A "project" is defined in Section 3(11) of the Act as a "complete unit of improvement or development." On the other hand, Section 3(12) of the Act defines "project works" as "the physical structures of a project." Section 4(e) of the Act empowers the Commission to license the construction, operation and maintenance of water power "project works"; it does not authorize the licensing of "projects" as such.

The Commission does not necessarily license all the project works of a given project at one time. It may, as in Project No. 5, grant authority for the installation,

operation and maintenance of certain project works upon prescribed conditions as to construction and payments; but such a license does not cover additional works, as Montana recognized by applying for the licensing of the third unit.

All three units are part of Project No. 5—all have been constructed pursuant to the license of May 23, 1930, as amended.

Section 10(e) says that readjustment may be made at the end of twenty years after the project is available for service. There is one project here. It became available for service on May 20, 1939, although a second unit did not come on stream until 1949 and a third unit not until 1954. To assert that readjustments are applicable in separate years is to assert separate licenses, separate projects. There are separate project works but there are no separate licenses; there are no separate projects.[4]

In *Arkansas Power & Light Company*, Project No. 271, 26 FPC 549, the Commission rejected a piecemeal approach as urged by the Company, with respect to a Section 10(d) determination (amortization reserves) stating:

> . . . In any event, the provisions of Section 10(d) apply to the project defined in the license as distinguished from some specified part thereof. Consequently, the amortization reserve period can commence only once with respect to the project defined in the license for Project No. 271, the application will be denied.

The most reasonable conclusion is that the readjustment of annual charges should be undertaken for the project in its entirety and not with respect to the time each generator began commercial operations. The logic of Montana Power's argument requires separate determinations of the rentals applicable to the first and second units, which were

---

[4] See, for example *Montana Power Co.*, 15 FPC 1330, 1335.

placed in service ten years apart. Not even Montana Power contends these two units comprise separate projects.

READJUSTMENT OF ANNUAL CHARGES

Section 10(e) of the Federal Power Act provides that the Commission shall "fix a reasonable charge for the use thereof" . . . and Section 30(D) of the License provides reasonable charges shall be fixed upon the basis of "the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."

Montana Power argues that the Commission should be limited in its determination of reasonable annual charges to modifying the annual charges previously determined to reflect any changed circumstances. We do not agree. Nothing in Section 10(e) of the Federal Power Act or in the Kerr license suggests such a limitation. These sources provide two broad standards: one, that the charges be based on the commercial value of the lands for the most profitable purpose; and second, that they be reasonable. In our opinion the reasonable commercial value of the land cannot be determined by considering individual factors in isolation. Instead, in fairness to all parties the entire analysis must be made *de novo*. This, it should be noted, is the established practice in rate cases followed by this, and most other regulatory agencies.

Montana Power's argument that such a procedure amounts to changing the rules in midstream cannot be adopted, for Congress has directed us in Section 10(e) of the Act to readjust annual charges. And Congress has given us a broad standard—that of reasonableness—as a guide. Essentially, Montana Power is complaining about the requirements of the statute. Such a complaint is properly directed to Congress, not to this agency.

Of course it cannot be assumed that a reasonable charge, once established, will remain the appropriate charge indefi-

nitely. Indeed, it is precisely because the rental value of land will vary that the statute and license provide for its readjustment in order to assure that the Licensee will not be unjustly enriched at the expense of the tribal owners. Obviously the parties did their best to set an initial charge —but all recognized that the charge set would not be binding for the life of the license.

While it is true that an annual charge cannot be viewed as immutable, it is equally clear that a prescribed charge will continue as the lawful charge under Section 10(e) until demonstrated to be inappropriate. Therefore, while under the statute we could readjust the annual charge once again to be effective May 20, 1969, such a readjustment will be made only if it is demonstrated that the charge here set is inappropriate. In view of the proximity of our conclusion here with the expiration of the present statutory period, we expect that the annual charge here fixed will remain the appropriate charge for a reasonable period beyond May 20, 1969, the earliest date on which a further readjustment could be made effective.

This brings us to the readjustment of the annual charges. Each party and Staff proposed at least one computation, the end results of which range from a low of $248,102 annually, advocated by Montana Power's witness Woy, to a high of $1,667,000 recommended by the Secretary's witness Mohler. With minor exceptions, all of the parties approached the problem in two parts. First, they computed the annual commercial value of the Kerr project. Second, they allocated a portion of this value to the Tribes based on the Tribes' ownership of lands and waters associated with the project. The portion so allocated to the Tribes was the annual rental they recommend we assess. A graphic summary of the methods and results advocated by the parties follows:

	Project Benefits			Allocated to Tribes	
	Dollars	Method Used	Percent	Dollars	Method
Examiner	3,427,000	net benefits; alternatives; 2 steam plants for 1st and 2nd units & Cochrane for 3rd unit.	25%	850,000	sharing net benefits 50% to landowners, 50% to developer.
Staff A	3,427,000	"	"	857,000	"
Staff B	2,529,000	same as A except use Cochrane for 2nd unit.	"	611,250	"
Staff C	2,550,400	same as A except use Cochrane for 1st unit.	"	632,350	"
Van Scoyoc (Tribes)	2,254,000	Profitability of project.	57.54	1,300,000	assigns to Tribes 100% of power value of dam site and 50% of Flathead & Hungry Horse.
Sporseen (Tribes)	2,474,000	net benefits; alternatives Buffalo Rapids 2 & 4.	42.13	1,150,000	50-50 land-water division. Co-assigned all water rights.
Mohler (Secretary)	2,981,666	net benefits; alternatives; average of High Mountain Sheep, Buffalo Rapids & steam.	55.9	1,667,000	50-50 split between land (dam site) & water.
Woy (Montana) 1	—	—	—	248,102	3rd unit charge plus Commission's formula for assessing administrative costs.
2	—	—	—	258,830	adaption of method used in Pelton-Round Butte agreement.
3	1,410,000	net benefits; alternatives: Cochrane & Bird Steam Plant.	25	352,500	same as examiner.
Seymour (Montana)	add 154,000 to previously determined benefits	existing charges modified to reflect known changes.	"	270,000	"

As shown above Staff, Sporseen, and Mohler advocated the "net benefits" approach in computing the annual commercial value of the project. Under this method, the value of a project is determined by figuring the cost of providing an amount of energy equivalent to that provided by the project by the most likely alternative at the time the project was constructed. The amount by which the costs of an alternative source (or sources) exceeds the costs of the subject project is said to be the "net benefits" of the project. Van Scoyoc's profitability method consists of a detailed study of the revenues attributable to the Kerr project for the years 1958 through 1964. The study embraces that share of the Company's total electric revenues reasonably attributed to Kerr together with a determination of the annual costs of producing power at Project No. 5, including a reasonable return on the net investment of the Company in the facilities used in the generation of such power. The annual costs deducted from the annual revenues according to the witness, reflect the actual commercial value of the Kerr site or the profitability of the development to the Company.

The above two methods, as the Examiner observed, are the two principal techniques utilized in this proceeding for determining the value of the Kerr site.[5]

Finally, witness Seymour offered a computation comprising the existing annual charge, modified to reflect known changes.

The decision in the Third Unit case constitutes the only precedent in this area.[6] And that offers little in the way

---

[5] Montana Power initially argued for two methods: one based on the Pelton-Round Butte formula, and a second based on the Commission's formula for the determination of reimbursement to the United States for Administrative costs. However, the Examiner properly rejected these methods as inapplicable here, and Montana Power has not pursued these arguments. It is therefore unnecessary to treat them further.

[6] *Montana Power Co.* v. *F.P.C., supra.*

of concrete criteria. In appraising the Commission's determination of annual charges, the Court said:

> The annual charges shall be reasonable, Section 10(e) says, and must be approved by the Secretary of the Interior and the Indians themselves; otherwise, the statute is silent as to how Indian rentals shall be computed. So the only question is whether the rental fixed by the Commission is reasonable.
>
> * * *
>
> Whether the Commission properly adopted and correctly applied the "Sharing of Net Benefits" method of computing the additional payment is not the question. The question is, rather, whether the end result is a reasonable one, as the statute requires it to be.

After spending considerable time over the various methods advanced, it becomes quite evident why Congress, the Court, previous Commissions and Examiners, and the Examiner herein are exceedingly general in their expressions on the subject. It also explains why the parties appeared most reluctant to discuss this particular issue at the oral argument, notwithstanding that this was the most difficult and most important issue. There is no one right method—all the others being totally wrong. Rather, there is a logic and rationality supporting most of the computations, but also obvious shortcomings.

We have decided that annual charges of $950,000 are reasonable within the meaning of Section 10(e) of the Federal Power Act for the following reasons.

After considering the various methods for computing the value of the project we adopt Van Scoyoc's method as the one which most conforms to the statutory intent. This is the only method which ascertains the value of the Kerr project for the most profitable purpose for which the Tribal lands are used, which all parties agree is for power production. We agree with the Examiner's observation that:

"Mr. Van Scoyoc's analysis provides a realistic and impressive demonstration of the profitability of Project No. 5 . . ." While the Examiner was concerned with the complexity and the uncertain allocations involved, *no party* has excepted to the manner in which this analysis was performed, and we believe from our independent scrutiny that the method was implemented in a reasonable manner. Moreover, while this method involves judgment factors, it has the advantage over the net benefits approach in that it is directly concerned with the actual operation of the project being considered and does not depend on such speculative aspects of the net benefits theory, as, for example, what alternative project the company would have constructed, a subject on which there is considerable debate, whether to use trended costs, or the appropriate level of coal costs for an alternative steam plant.

The examiner criticizes the profitability method as a form of profit sharing not contemplated or intended by the parties, and appeared to reject the method for that reason. Along these lines, Staff argues that the annual charge could be nothing under this concept if the project were unprofitable. We disagree on two grounds. First, the parties by the very terms of Article 30(D) of the License in readjusting charges spoke in terms of fixing them "upon the basis provided in Section 5 of Regulation 14 of the Commission,[7] to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." It seems to us that a form of profit sharing was indeed contemplated, or, at the very least, reasonably within the scope of the language.

---

[7] Sec. 5. When licenses are issued involving the use of tribal lands embraced within Indian reservations, the commission will fix a reasonable annual charge for the use thereof, based upon the commercial value of the land for the most profitable purpose for which suitable, including power development. The charge shall commence upon date license is issued.

Second, this method does not mean that the Tribes are completely dependent upon how Montana Power operates the project. In this case, there is no evidence or contention that the company operated the project other than in the most economical manner. If such a contention were made and proved, annual charges in that event would not be based on the actual use of the project.

In addition to our previously expressed objections to witness Seymour's approach, we agree with the Examiner's criticism that it inconsistently relies on the results of the third unit proceeding, which utilized the net benefits method; yet at the same time, the approach essentially rejects using the net benefits method.[8]

This brings us to considering the appropriate percentage of the commercial value of the Kerr project which should be allocated to the Tribes by virtue of the ownership of related lands and waters. Similar to the figures in the first step, there are widely varying recommendations ranging from 25 percent by Staff, Woy and Seymour to 57.53 percent by Van Scoyoc.

Before describing the various methods, it is helpful to understand the three factors accounting for the value of the Kerr project. These three factors are the dam site (owned by the Tribes), Flathead Lake (the proprietary interest in which is equally divided between the Tribes and Montana Power), and releases from Hungry Horse, (respecting which neither Montana Power nor the Tribes have any proprietary interest). During critical water

---

[8] We, of course, recognize that the net benefits method has been used, at least in some fashion, in prior determinations. As among these variations, but without recounting the merits and demerits of each of the several variations advanced, we believe that Staff's C computation of $2,550,400, which approximates Sporseen's $2,474,000, to be the most reasonable based on our analysis of the record. In the absence of the Van Scoyoc method which we consider more reliable, we would be persuaded that the commercial value of the Kerr project approximates $2,500,000.

conditions, Kerr generation totals 1069 MW months: 161 MW months by natural stream flow, i.e., the dam site; 251 MW months by Flathead Lake storage; and 657 MW months by Hungry Horse storage.

The method used by Staff (which also forms a part of certain of the recommendations of other parties) is denominated as the sharing of net benefits method. This method assigns 50 percent of the net project benefits to the ownership of the power site and 50 percent to the developer for taking the risks associated with developing the site. The dam site and Flathead Lake are considered as a unit. Since the Tribes own one-half of Flathead Lake, their portion is said to be one-half of one-half, or 25 percent of the net benefits. This was the method nominally followed by the Commission in the third unit case.

Three other methods have been suggested. Mohler began by assuming that the benefits should be apportioned based on the ownership of land and water. Since the Tribes own the land on which the project is located, he assigned the entire 50 percent attributable to land to the Tribes. He then determined that Flathead Lake represented 23.5 percent of the value of the project which is attributable to water. The Tribes' allocable portion of this 23.5 percent is 5.7 percent. This was derived by dividing 23.5 percent by one-half since Flathead was assumed to be on the water side of the equation, with another 50 percent reduction to reflect the Tribes one-half ownership of the lake.

Van Scoyoc also attempted to weigh the contribution of tribal lands and water with nontribal lands and waters based on critical water conditions. Because the Tribes own 100 percent of the dam site, they are assigned 100 percent of the natural stream flow. Since the ownership of Flathead Lake is equally divided, he assigned 50 percent of the power value of Flathead to the Tribes. Finally, he

divided Hungry Horse releases 50-50 because they flowed into Flathead Lake. To summarize graphically:

	MW Months		Tribes' Share		
Kerr Plant Site	161	x	1.00	=	161.0
Flathead Lake	251	x	.50	=	125.5
Hungry Horse	657	x	.50	=	328.5
	1069				615.0

$$\frac{615}{1069} = .5753 \text{ or } 57.53\%$$

Sporseen's approach is similar to the sharing of the net benefits in that it does not lump land and water rights. Sporseen attributed water rights to the Company on the basis of its proprietary interest, and land rights to the Tribes and Montana Power on the basis of their respective interests thereto. Like Van Scoyoc and Mohler, the basis of his computations is Kerr generation under critical water conditions. He segregated Flathead Lake from Kerr generation. The value of Kerr without Flathead is 818 MW months (161 MW months natural stream flow and 657 MW months from Hungry Horse), i.e., 68.5 percent of the total. The Tribes' share, based on 50-50 division between land and water is 34.25 percent. To this must be added one-half the value of Flathead; 50-50 split between land and water with a further 50-50 split to reflect the ownership of one-half of the lands. One-fourth of Flathead's power value of 376 MW months [9] or 31.3 percent of total Kerr is nearly 8 percent which, when added to the above-mentioned 34.23 percent produces his result of 42.13 percent.

According to the proponents, the sharing of the net benefits has the advantage of having been used before. In our view, there is very little else to be said in its favor. Indeed, Staff's briefs are almost silent on this issue. It is true this method was allegedly used in the third unit case. However, the Examiner's decision therein

[9] He multiplied the value of Flathead by 1.5 to reflect its importance to Hungry Horse releases.

casts considerable doubt on that proposition (25 FPC 225, 229). Moreover, the use of that method was based on the Commission's use of it in determining annual charges a licensee should pay for sharing a government dam.[10] As Staff conceded at the oral argument, there is a world of difference between the government in such a situation and the Tribes here. The government maintains control over the dam and its project works. It continues to derive benefits from them. In contrast, the Tribes are completely without the use of these lands and derive no benefit other than the annual charges we assess. The reviewing Court apparently was not overly impressed with this method for it sustained the Commission on the basis of the end result—not the methodology.

There are further objections. Staff's method assigns 50 percent of the net value to the developer. Since we are using Van Scoyoc's profitability method, Montana Power's risks, such as they are, are fully reflected in the rate of return element of project costs which were deducted from the project revenues in determining the project's net benefits. Additionally, this method lumps the values attributable to natural stream flow, Flathead Lake and Hungry Horse, and fails to weigh the interests of each party in these three principal contributors to the Kerr Project.

The Secretary has shown the strange and illogical results this method can produce by applying it to other situations. (1) If the Tribes own all of the land underlying the generating site and lake bed, they receive half of the net benefits, and the Company receives half; (2) if, as in this case, the Tribes own all of the generating site land and half of the lake bed, they receive 25 percent of the net benefits and the Company, 75 percent; (3) if the Tribes own all of the generating site lands but none of the lake bed, they receive one percent of the net benefits,

---

[10] *Kanawha Valley Power Co.*, Project No. 1290, Item F.

while the Company receives 99 percent; (4) if the Tribes own none of the generating site lands but half of the lake bed, they receive 24 percent of the net benefits and the Company, 76 percent; and (5) if the Tribes own none of the land underlying the generating site but all of the lake bed, they receive about 49 percent of the net benefits and the Company, 51 percent.

In none of the situations described above does the Company own any land within the project. Yet it may receive from 50 percent to 99 percent of the net benefits. In the first three situations the Tribes own all the land underlying the dam and powerhouse. Yet they may receive from one percent to 50 percent of the net benefits. But in the last two situations, even though they own none of the power site lands, the Tribes may receive from 24 percent to 49 percent of the net benefits. The unreasonableness, inconsistency, and inequity of these diverse results are directly attributable to the failure in the method employed to properly distinguish between land underlying the dam and powerhouse and land underlying the lake bed.

With one exception, we believe Montana Power has expressed the most appropriate concept for making the allocation in its brief opposing exceptions. It there criticizes the allocations of Mohler as conceptually wrong because power value requires an inseparable combination of both land and water. The same criticism is also applicable to Van Scoyoc's method, at least insofar as it allocates the value of the dam site exclusively to the Tribes. Montana Power states: "If the combination of land and water is to be used as a basis for sharing a net benefit, some grouping of land ownership and water associated with that land ownership must be made."

This is precisely what Sporseen has done, and we believe his method to be the most reasonable of those advanced in this proceeding. The only difference between what Sporseen did and what Montana Power argues relates to Hungry Horse. Sporseen included it. Montana Power

would not on the basis that none of the land required to develop Hungry Horse storage is owned by the Indians and because headwater payments are made by the licensee. Regarding the latter, headwater payments were deducted in computing the benefits, so that point is not meritorious. Regarding the former, we think Hungry Horse should be included because the value of a parcel of realty depends not only on its intrinsic worth, but also upon its location relative to other realty. Thus, land adjacent to the intersection of two interstate freeways is more valuable for commercial purposes than an identical parcel of property on a little used secondary road. And the property on which Kerr is located is similarly more valuable by reason of its location relative to Hungry Horse. To close our eyes to Hungry Horse would be to fail to recognize the value of Kerr.

Accordingly we adopt Sporseen's 42.13 percent allocation figure which, when applied to Van Scoyoc's computation of profitability of $2,254,286 produces annual charges of $949,731, which we will round off to $950,000.

We consider this end result reasonable. It is certainly much closer to reality than the existing annual charges of $238,375, or the charges Montana Power recommends herein. The Secretary showed the relationship of the present charges to Montana Power's electric revenues:

		Annual Charges as % of Total Electric Revenue of Montana Power Company
		$238,375
Year	Electric Revenue	Woy
1959	$31,382,095	0.745%
1960	33,651,530	0.695%
1961	35,319,552	0.662%
1962	37,301,369	0.627%
1963	37,395,371	0.625%
1964	39,301,704	0.595%

Kerr represents 35.75% of the Company's total installed generating capacity. In critical water years it supplies approximately 40 percent of the Company's total hydroelectric capability. The estimated annual generation at Kerr is 32.05 percent of the Company's total hydroelectric generation during median years. Kerr contributed 30.53 percent of the Company's total hydroelectric net generation during 1958-64. During 1958-64 Kerr contributed approximately 25 percent of the Company's total system resources to the earning of its revenues. In light of the above, the Company's proposals are not reasonable after giving apropriate weight to the Company's transmission, distribution and other expenses.

The Commission further finds:

That the decision of the Presiding Examiner should be adopted to the extent consistent with this opinion.

The Commission orders:

(A) Readjusted annual charges for the use of Confederated Salish and Kootenai tribal lands by Project No. 5 are $950,000 per year.

(B) Readjusted annual charges for Project No. 5 shall be effective as of May 20, 1959, and shall bear simple interest at the rate of 6 percent per annum from such date.

By the Commission.

CARVER, Commissioner, *concurring:*

The Secretary of the Interior, when he initially intervened in this case, asserted a position not subsequently withdrawn, and not dealt with either by the Examiner or by the Commission. That position was that there inhered in the Secretary the right to reject a determination made by this Commission in these proceedings, in other words to "veto" it.

As originally articulated to the Examiner, the Secretary's position was that he "has both a duty and a right to approve any readjustments of annual charges ordered by the Federal Power Commission : . . . This veto power is based upon general and specific statutes and is expressly preserved in the terms of the license . . . [P]articipation [in these proceedings] shall not be construed as abandonment of the Secretary's ultimate power [of] approval over such readjusted charge as may be ordered by the Commission." [1]

In another document, the Secretary "reaffirm[ed] his intention to participate . . . in full compliance with the Commission's rules and regulations . . . [a]fter, however, the proceeding has reached its conclusion, *including the exhaustion of appellate procedures,* the Secretary then has a responsibility to determine whether the Commission's findings should be accepted or rejected." [2] (Emphasis added.)

Essentially the same position was restated in oral argument at Tr. 1561-1571 and Tr. 1585-1586.

The Secretary's position in this respect should not remain unchallenged and undiscussed. Parties to proceedings before this Commission, whether the Secretary of the Interior or anyone else, cannot be permitted to assert, unchallenged, a right to "veto" the Commission and the courts. If Congress has in fact given the Secretary such power, then it is only fair to the other parties litigant and to the Commission and the courts, to be spared the vain exercise of notice, hearing, and adjudication.

In his citation of statutory authority for his position, section 4(e) of the Federal Power Act is listed. This sec-

---

[1] Tr. 73.

[2] "Objection and Answer of Secretary of the Interior Stewart L. Udall to Montana Power Company's Motion for Issuance and Subpoena," dated and filed October 22, 1965, pp. 4-5.

tion gives the Secretary the prerogative of inserting conditions in licenses on property within his supervision in order to safeguard the purpose for which such reservation was created. This power relates to the initial issuance of licenses; the Secretary of Interior is granted no absolute power to overrule a Commission determination under section 10(e), which provides

> "that when licenses are issued involving the use of government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, *in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands* . . . fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years . . ." (Emphasis added.)

The tribes gave their approval to the Commission's readjustment subject to judicial review by filing a petition with this Commission in 1959, the petition now being decided.

The reference to "like approval" has as its antecedent, approval by the Indians. Seemingly, the Secretary's argument is that this becomes his approval inasmuch as he is trustee for the Indians. This is not helpful on the procedural question posed: if the Secretary has such overriding power is it proper for the parties, the Commission, and the reviewing courts to go through the motions of determining the charges?

The Secretary states (Brief on Exceptions, p. 12) that this "power stems from the Act of March 7, 1928 (45 Stat. 200, 212-213)." That Act was an appropriation bill allowing the Secretary to spend money for an irrigation and

generation system on the Flathead Reservation and granting the Federal Power Commission the authority

> "in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits on a license or licenses for the use, for the development of power, or power sites on the Flathead Reservation and of water rights reserved or appropriated for irrigation projects . . ."

Nowhere in this 1928 appropriations act is the Secretary given any greater power than to require conditions be inserted in any license or permit. This grants no veto over readjustments in charges. The other statutes upon which the Secretary relies (Footnote 4, Brief on Exceptions) do no more than grant him various powers over irrigation and power sites, as well as general responsibility for Indian relations. None grants any "veto".

A reference to the Secretary's "veto" power is contained in a footnote to the Court of Appeals of the District of Columbia's opinion on the Third Unit case, *Montana Power Company* v. *FPC*, 1962, 298 F 2d 335. Chief Judge Miller, in his statement of the background of the case, noted the Commission's adoption of an order fixing section 10(e) charges for the Third Unit of the Kerr Project at $50,000, "subject to the approval of the Secretary of the Interior." The Secretary in that case did not approve, and reopened proceedings took account of his objections as to the method of computation of the charges, but without his participation or submission of evidence. On this point, the footnote reads:

> "It was unnecessary and, perhaps, not even proper for him to do so. The Secretary was not a party to the proceeding. *While he has a veto power*, he is not required to aid the Commission in reaching its determination." *Montana Power Company* v. *Federal Power Commission*, CADC, 1962, 298 F.2d 335, 338. (Emphasis added.)

What the Court of Appeals presumably had in mind about the "veto power" was the explicit provision of the Commission order making its determination subject to the Secretary's approval. In the reopened proceedings, the Secretary's recommendations as to the appropriate level of 10(e) charges were adopted by the Commission.

The Commission has probably diminished the possibility of the Secretary exercising his supposed "veto" power, and thus furnishing a fair judicial test of his asserted prerogative, by adhering somewhat closely to the Secretary's contentions as to the method of computation and by fixing an award materially higher than that determined by the Examiner.

In the event the Court of Appeals should be asked to review the determination of appropriate rental to be paid to the Indian landowners—a distinct possibility in the light of the divergent views and fierce contest of this matter at every stage—it will have the opportunity to ponder whether the trust responsibilities of the Secretary of the Interior extend, as he has urged, both to nullify our determination and that of the Court of Appeals if he so chooses.

The reviewing court, if appeal is taken can also consider the relationship of the present case to the Third Unit case, cited above. When the District of Columbia Court of Appeals in 1962 affirmed the Commission's determination of section 10(e) charges for the Third Unit of Project No. 5, the redetermination case being decided today was three years old, having been commenced on May 19, 1959. The rationale of the Third Unit case was not the profitability rationale of today's decision; it was the net benefits rationale. The Third Unit's contribution to the whole of Project No. 5 is roughly half, in terms of generating capacity and energy generated. The Court of Appeals in 1962 determined annual charges of $63,000 attributable to that half, beginning in 1954, and presumably continuing until redetermined in accordance with the statute. Today's re-

determination is premised upon treating all three units together, thus making the effective date of redetermination for the Third Unit the same as that for the project as a whole, or May 1959. The effect of today's opinion is to wipe away that part of the 1961 Commission order, and its 1962 affirmance by the Court of Appeals, which covers the period from 1959 forward. If the prior Commission action, as affirmed by the Court, is to be rendered a partial nullity —in other words if the pro rata share of the Third Unit charges from 1959 to 1962, or from 1959 until the present, is to be raised from $63,000 to eight times that amount, then a judicial prerogative question might be presented to the Court of Appeals, namely, whether its earlier action was intended to be conditional to that extent. The present action, it must be remembered, was then pending.

An overriding consideration of fairplay is important in determining fair charges for hydroelectric projects licensed by the Commission. When a license is tendered, the applicant has the option of declining if he is not satisfied with the terms and conditions of the license. In the case before us today, one term of the license was that annual charges would be adjusted at the end of twenty years, and at ten-year intervals thereafter. In the best of all possible worlds, an applicant licensee should be able at that time to evaluate the economic impact of conditions attached to the license within reasonable limits. In other words, he must measure his best judgment about future operations and future economic conditions in the light of a tolerably stable regulatory pattern. Exposure to regulatory contingencies is an obligation of citizenship; applying regulatory contingencies fairly is an obligation of government.

The licensee and its stockholders and ratepayers are protected here mainly by the standard of reasonableness. As an abstract proposition it is fair and reasonable for a licensee to share his profits with landowners, whether Indian owners, other private owners, or the public at large. On a practical basis, however, a proposition so fundamen-

tal as the sharing of profits should be a part of the "rules of the game," spelled out either in legislation or in regulations.

Still I do not dissent, for the end result of giving the Indians the benefit of the test adopted by the Commission today, seems to me reasonable under all the circumstances. I am, as stated, uncomfortable about reconciling the prior action on the Third Unit with today's action. Similarly, I believe the Secretary of the Interior's contentions regarding his overriding power to veto both our determination and that of the Court of Appeals if he feels so moved should be faced squarely. Finally, the absence of a clear rule specifying that a profitability test might be applied retrospectively raises questions which may concern the Court which affirmed a different test.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.:

The Montana Power Company) Project No. 5

Order Denying Applications for Rehearing

(Issued March 21, 1968)

On October 19, 1967, the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) and on November 3, 1967, The Montana Power Co. (Montana) filed an application for rehearing of Opinion No. 529 and the accompanying order issued October 4, 1967, readjusting the annual charges due under the license for Project No. 5, the Kerr Hydroelectric Development, for the use of Indian tribal lands. By letter dated November 3, 1967, the Secretary of Interior accepted our October 4, 1967, order. On

November 17, 1967, we granted rehearing in order to afford further time for consideration of the issues.

The Tribes allege Commission error only in one respect; i.e., that the Commission failed to take into consideration the factor of income occurring to Montana by reason of downstream releases in assessing rentals due the Tribes. The Tribes contend this element of income, their portion of which they estimate to be $42,000, was unavailable at the hearing and was not included in witness Van Scoyoc's profitability method adopted by the Commission.

Montana challenges Commission jurisdiction to readjust the annual charge and further alleges that the Commission erred in: readjusting annual charges effective May 20, 1959; requiring interest payments on such readjusted charge effective May 20, 1959; readjusting charges to include Kerr's third unit; and erred in utilizing the profitability method as the basis for determining annual rentals.

Both the Tribes and Montana improperly assume that the Commission's determination was based exclusively on the profitability method of Van Scoyoc and the allocation factor of Sporseen. This was not the case. The Commission's decision was based on the record as a whole, including the role of the Kerr project as a significant element in Montana's system and a major contributor to its earning power. The decision did use the profitability method as a guide in arriving at its end result, noting at the same time that a proper application of the net benefits method would have produced approximately the same result. In so doing, the Commission noted that the profitability method more closely conforms to the Commission's regulations on this subject.

Contrary to Montana's assertion, we have not decided the question whether our determination is subject to the approval of the Secretary of Interior. Since the Secretary has accepted the Commission's determination of this proceeding, the issue is not presented in this case.

None of the assignments of error and grounds for rehearing set forth in the applications for rehearing present any facts or legal principles which warrant any change or modification of the Commission's Opinion No. 529 and accompanying order. Accordingly, we reaffirm our original order and deny the applications for rehearing.

By the Commission.

CARVER, Commissioner, *dissenting:*

For the reasons outlined in my concurring statement (Opinion 529, issued October 4, 1967), I would consider and decide whether the Secretary of the Interior has the power to veto the action of this Commission and of the courts, in fixing annual charges under Section 10(e) of the Federal Power Act.

Attached to this dissent is a copy of the letter of the Secretary of the Interior of November 3, 1967, wherein he signifies "acceptance of the October 4 Order" (Opinion 529). That acceptance is capable of being read as an affirmation of the contention made consistently and persistently in the progress of this case that the right of veto exists. [See, for example, the extensive exposition and legal justification of this theory in the Secretary's Brief Opposing Exceptions of November 8, 1966, pp. 12-13; in the Opening Brief to the Examiner of February 5, 1966, at pp. 7, 21 and 22; and the affirmation of the authority in an "Objection and Answer of the Secretary" filed with the Examiner on October 22, 1965, p. 5. See, also, the transcript references in my concurring statement, p. 1.]

It is the essence of the specification of error in the petition for rehearing, page 9, that a "substantive" right is jeopardized by applying section 10(e), if it is read as including approval of the readjusted charge by the Secretary.

By failing to affirm or deny the existence of the veto power, reciting rather that the issue "is not presented in

this case", the Commission has only transferred the question to the Court of Appeals.

It would appear that if a genuine question exists, which has been put to the Commission in several ways, including the contentions in Briefs, in oral argument, in the Petition for Rehearing, and in the Secretary's letter filed after the decision, the very least the Commission should do would be to state its view of the law. Since I raised the issue in my concurrence, and the licensee has placed the question before the Commission in a substantive form, and since the Secretary's letter of November 3, 1967, is pregnant with his affirmation of the existence of the power, the reviewing court might conclude that the Commission concedes the Secretary's power to veto Commission action; it would be difficult for it to conclude that the Commission has denied it. In any event, the Court of Appeals will not easily be able to avoid the attack upon the integrity of its own jurisdiction.[1] If the Court feels constrained to deny that the veto power exists as to its judicial determination, the Commission's present silence may become very embarrassing, whether the case is remanded to the Commission to fill the hiatus or otherwise.

It cannot be persuasively argued that the matter is moot because of the Secretary's letter of November 3. In view of the contention that the power exists until all appellate procedures are exhausted, the reviewing court would have to dispose of the question of this power negatively before it could modify the Commission's determination of section 10(c) charges in any respect. In other words, if the Court

---

[1] See particularly the language in the Objection and Answer of Secretary of the Interior, Stewart L. Udall, to Montana Power Company's Motion for Issuance of Subpoena, dated and filed October 22, 1965, at pages 4 and 5: "After, however, the proceeding has reached its conclusion, *including the exhaustion of appellate procedures*, the Secretary then has a responsibility to determine whether the Commission's findings should be accepted or rejected." (Emphasis added.)

should find itself agreeing with the licensee-appellant on any of the numerous computational points, and reduce the annual charges, or determine that the charges were not applicable for the full period, or that the earlier case disposed of the issue as to the third unit, then it would be that court, not just the Commission, which would be exposed to exercise of the veto in the form so persistently asserted.

The failure of the Commission to face this issue squarely and determine it one way or the other creates a substantive deficiency which requires me to dissent.